

**HB**

**115**

<TARGET><BILL>HB 115</BILL><SUBJECT>HB  
115</SUBJECT><COMM>HF IN 29</COMM></TARGET>



# Fiscal Note

State of Alaska  
2015 Legislative Session

Bill Version: HB 115  
Fiscal Note Number: \_\_\_\_\_  
( ) Publish Date: \_\_\_\_\_

Identifier: HB115CS(FIN)-DNR-MLW-03-20-15  
Title: AK SOVEREIGNTY;US TRANSFER LAND TO  
ALASKA  
Sponsor: CHENAULT  
Requester: House Finance Committee

Department: Department of Natural Resources  
Appropriation: Fire Suppression, Land & Water Resources  
Allocation: Mining, Land & Water  
OMB Component Number: 3002

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2016	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2016 Request	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
<b>OPERATING EXPENDITURES</b>	<b>FY 2016</b>	<b>FY 2016</b>	<b>FY 2017</b>	<b>FY 2018</b>	<b>FY 2019</b>	<b>FY 2020</b>	<b>FY 2021</b>
Personal Services	***		***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
<b>Total Operating</b>	***	0.0	***	***	***	***	***

**Fund Source (Operating Only)**

None							
<b>Total</b>	***	0.0	***	***	***	***	***

**Positions**

Full-time							
Part-time							
Temporary							

<b>Change in Revenues</b>							
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**Estimated SUPPLEMENTAL (FY2015) cost:** 0.0 *(separate supplemental appropriation required)*  
*(discuss reasons and fund source(s) in analysis section)*

**Estimated CAPITAL (FY2016) cost:** 0.0 *(separate capital appropriation required)*  
*(discuss reasons and fund source(s) in analysis section)*

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No  
If yes, by what date are the regulations to be adopted, amended or repealed? N/A

**Why this fiscal note differs from previous version:**

This CS slightly modified the lands affected by the bill. The fiscal impact is still indeterminate; the analysis section was revised to match the CS.

Prepared By: Brent Goodrum, Director	Phone: (907)269-8625
Division: Mining, Land & Water	Date: 03/20/2015 05:00 PM
Approved By: Mark Myers, Commissioner	Date: 03/20/15
Agency: Department of Natural Resources	

FISCAL NOTE ANALYSIS

STATE OF ALASKA  
2015 LEGISLATIVE SESSION

BILL NO. HB 115

**Analysis**

This analysis assumes that the bill would be successful at least in part in getting the federal government to convey public lands to the state as stated in Section 3. If successful, this bill could more than double state ownership of acreage assets (currently about 100 million acres) and, depending on the kinds of federal lands included in the transfer, potentially increase state acreage even more than that. Receiving the Bureau of Land Management, US Fish and Wildlife Service, and US Forest Service managed federal lands, without considering the submerged land, would increase land owned or managed by the state by approximately 166 million acres.

Once title has been accepted, the state and not the Federal government would assume the costs for managing the conveyed lands. These costs are unknown and could be significant. Considering the existing staff and cost it takes to manage the existing state lands, and to evaluate them prior to conveyance, this significant increase of land ownership could require a correspondingly significant increase of staff and expense to manage the new lands. However, these costs could be more than offset by potential revenues from these lands.

**CS FOR HOUSE BILL NO. 115(FIN)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-NINTH LEGISLATURE - FIRST SESSION**

**BY THE HOUSE FINANCE COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVES CHENAULT, Johnson, Olson, Keller, Millett, Talerico, Herron, Reinbold, Thompson, Neuman, Saddler**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the sovereignty of the state and the state's right to a credit or setoff**  
2 **for amounts or injuries inequitably or unlawfully caused or claimed by the federal**  
3 **government; requiring the United States to lift certain land orders and federal**  
4 **withdrawals; relating to the transfer of public land or interests in public land from the**  
5 **federal government to the state and to the disposal of that land or any interest in land;**  
6 **and providing for an effective date."**

7 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

8 **\* Section 1.** The uncodified law of the State of Alaska is amended by adding a new section  
9 to read:

10 **SHORT TITLE.** This Act may be known as the Alaska Sovereignty and Transfer of  
11 Federal Public Land to Alaska Act.

12 **\* Sec. 2.** AS 44.03 is amended by adding a new section to read:

13 **Sec. 44.03.005. State sovereignty; right to setoffs.** (a) The state solemnly

1 affirms its state sovereignty and fully reserves and asserts all rights and powers  
 2 directly and indirectly related to those rights and powers under the Ninth and the  
 3 Tenth Amendments to the Constitution of the United States.

4 (b) The affirmation, reservation, and assertion in (a) of this section include the  
 5 reservation of the rights of the state to claim a credit or setoff for any amount or injury  
 6 inequitably or unlawfully caused or claimed by the federal government.

7 \* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to  
 8 read:

9 TRANSFER OF FEDERAL PUBLIC LAND; RECEIPT BY THE STATE. (a) Before  
 10 January 1, 2017, the United States shall, subject to acceptance by the state,

11 (1) relinquish title to public land or an interest in land in the state; and

12 (2) transfer title to public land or an interest in land to the state.

13 (b) Under the authority in AS 38.05.035(a)(11) or as otherwise provided by law, the  
 14 director of the division of lands in the Department of Natural Resources shall accept the land  
 15 and interest in land conveyed to the state under (a)(2) of this section on behalf of the state if  
 16 the director determines that the acceptance is in the best interest of the state.

17 (c) If the land or interest in land the state receives under (a)(2) of this section is sold,  
 18 leased, or granted, each contract for the sale, lease, or grant of state land or interest in land,  
 19 and each deed for state land, properties, or an interest in land transferred by the state must  
 20 include a reservation using the language provided for a reservation in AS 38.05.125(a).

21 (d) In this section, "public land" means federal land in the state except for land

22 (1) to which title is held by a person that is not a governmental entity;

23 (2) used for military or naval purposes, including a military reservation; or

24 (3) that was a national park on January 1, 2015.

25 \* **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to  
 26 read:

27 LIFTING OF PUBLIC LAND ORDERS; PERIOD FOR MINERAL  
 28 EXPLORATION AND RESOURCE EVALUATION. (a) For land not transferred to the state  
 29 under sec. 3(a)(2) of this Act, the United States shall lift all public land orders and federal  
 30 withdrawals subsequent to those public land orders of land in the state so that state land  
 31 selections that are currently in top-filed status on that land may attach.

1 (b) To allow the state sufficient time to conduct mineral exploration and resource  
2 evaluation on the land subject to public land orders and federal withdrawals under (a) of this  
3 section, 43 U.S.C. 1635(f) (sec. 906(f), Alaska National Interest Lands Conservation Act, P.L.  
4 96-487, 94 Stat. 2371) is suspended until the later of January 1, 2037, 20 years after the date  
5 the last public land order is lifted under (a) of this section, or the date the last withdrawal  
6 subsequent to those public land orders is lifted.

7 \* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

*Adopted  
3/23/15*

29-LS0587I  
Bullard  
3/18/15

**CS FOR HOUSE BILL NO. 115(FIN)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-NINTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES CHENAULT, Johnson, Olson, Keller, Millett, Talerico, Herron, Reinbold, Thompson, Neuman, Saddler

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3 government; requiring the United States to lift certain land orders and federal  
4 withdrawals; relating to the transfer of public land or interests in public land from the  
5 federal government to the state and to the disposal of that land or any interest in land;  
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15 and interest in land conveyed to the state under (a)(2) of this section on behalf of the state if  
16 the director determines that the acceptance is in the best interest of the state.

17 (c) If the land or interest in land the state receives under (a)(2) of this section is sold,  
18 leased, or granted, each contract for the sale, lease, or grant of state land or interest in land,  
19 and each deed for state land, properties, or an interest in land transferred by the state must  
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31 selections that are currently in top-filed status on that land may attach.

1 (b) To allow the state sufficient time to conduct mineral exploration and resource  
2 evaluation on the land subject to public land orders and federal withdrawals under (a) of this  
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5 the last public land order is lifted under (a) of this section, or the date the last withdrawal  
6 subsequent to those public land orders is lifted.

7 \* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

# Fiscal Note

State of Alaska  
2015 Legislative Session

Bill Version:	CSHB 115(RES)
Fiscal Note Number:	1
(H) Publish Date:	3/4/2015

Identifier: HB115-DNR-MLW-2-23-15  
 Title: AK SOVEREIGNTY;US TRANSFER LAND TO ALASKA  
 Sponsor: CHENAULT  
 Requester: House Resources Committee

Department: Department of Natural Resources  
 Appropriation: Land & Water Resources  
 Allocation: Mining, Land & Water  
 OMB Component Number: 3002

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
			FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
<b>OPERATING EXPENDITURES</b>	<b>FY 2016</b>	<b>FY 2016</b>	<b>FY 2017</b>	<b>FY 2018</b>	<b>FY 2019</b>	<b>FY 2020</b>	<b>FY 2021</b>
Personal Services	***		***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
<b>Total Operating</b>	***	0.0	***	***	***	***	***

**Fund Source (Operating Only)**

None							
<b>Total</b>	***	0.0	***	***	***	***	***

**Positions**

Full-time							
Part-time							
Temporary							

<b>Change in Revenues</b>							
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**Estimated SUPPLEMENTAL (FY2015) cost:** 0.0 (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**Estimated CAPITAL (FY2016) cost:** 0.0 (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No  
 If yes, by what date are the regulations to be adopted, amended or repealed? N.A

**Why this fiscal note differs from previous version:**

Not applicable. Initial Version.
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Prepared By: Brent Goodrum, Director  
 Division: Mining, Land & Water  
 Approved By: Mark Meyers, Commissioner  
 Agency: Department of Natural Resources

Phone: (907)269-8625  
 Date: 02/23/2015 05:00 PM  
 Date: 02/23/15

## FISCAL NOTE ANALYSIS

STATE OF ALASKA  
2015 LEGISLATIVE SESSION

## Analysis

This analysis assumes that the bill would be successful at least in part in getting the federal government to convey public lands to the state as stated in Section (a). Section (c) of the bill requires the state to accept title to lands conveyed by the Federal Government. If successful, this bill could more than double state ownership of acreage assets (currently about 100 million acres) and, depending on the kinds of federal lands included in the transfer, potentially increase state acreage even more than that. Receiving the Bureau of Land Management, US Fish and Wildlife Service, and US Forest Service managed federal lands, without considering the submerged land, would increase land owned or managed by the state by approximately 166 million acres.

Once title has been accepted, the state and not the Federal government would assume the costs for managing the conveyed lands. These costs are unknown and could be significant. Considering the existing staff and cost it takes to manage the existing state lands, this significant increase of land ownership could require a correspondingly significant increase of staff and expense to manage the new lands.

In addition, under section (c), it appears that the federal government could convey all of its contaminated sites and the state **would be required to** accept title to the lands by law. If the bill is not amended to allow the state to choose which lands to accept from the federal government, then the state would be required to accept the liabilities and costs of the problems with the land conveyed. This would result in potentially unlimited costs for liability and cleanup on these lands for the state (which has largely been deferred by the federal government to date).

Further, Section (b)(2) requires the state to pay to the federal government various shares of the proceeds the state may receive from the sale or other disposal of interests in the lands conveyed under the bill. Currently the state receives payments for various shares of mineral revenues the federal government receives on these land, (90% of uplands mineral revenues and 27% of revenues from outer continental shelf submerged lands out to 6 miles from mean high water). The state currently does not receive any share of federal revenues from non-mineral disposals. It is unclear what additional revenues that could be gained with the new lands (although in some areas these revenues may be quite significant), and how these revenues, after the federal payments, would compare to the associated management costs.

In addition, the bill may require new revenue sharing with the federal government. The bill proposes to share 50% of all non-mineral leasing revenues and 10% of all mineral leasing revenues of the transferred lands. These provisions of the bill might amount to large payments to the federal government.

Additionally, it seems possible that a small portion of the lands received under section (a)(2) would otherwise be part of the Statehood Entitlement. This could result in revenue-sharing type payments to the federal government revenues from lands that would otherwise be received under Statehood Entitlement. We recommend the bill be modified to ensure that the revenue sharing provisions do not apply to lands that otherwise may be conveyed as part of our statehood land entitlement.

# A Legal Overview of Utah's H.B. 148 — The Transfer of Public Lands Act

*By Donald J. Kochan*



THE FEDERALIST SOCIETY JAN. 2013

## ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce "white papers" on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts, and criticisms by writing to us at [info@fed-soc.org](mailto:info@fed-soc.org), and, if requested, we will consider posting or airing those perspectives as well.

For more information about the Federalist Society, please visit our website: [www.fed-soc.org](http://www.fed-soc.org).

## ABOUT THE AUTHOR

Donald J. Kochan is a Professor of Law at Chapman University School of Law, where he teaches a variety of courses including Natural Resources Law & Policy, Real Property Law, Administrative Law, Federal Courts, and Law & Economics.

**A LEGAL OVERVIEW OF UTAH'S  
H.B. 148 — THE TRANSFER OF  
PUBLIC LANDS ACT**



***Donald J. Kochan***

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## INTRODUCTION

Recent legislation passed in the State of Utah has demanded that the federal government extinguish title to certain public lands that the federal government currently holds. The State of Utah claims that the federal government made promises to it (at statehood when the federal government obtained the lands) that the federal ownership would be of limited duration and that the bulk of those lands would be timely disposed of by the federal government into private ownership or otherwise returned to the State. This White Paper provides a legal overview of these claims.

On March 23, 2012, Governor Gary Herbert of the State of Utah signed into Utah law the "Transfer of Public Lands Act and Related Study," ("TPLA")<sup>1</sup> also commonly referred to House Bill 148 ("H.B. 148").<sup>2</sup> This legislation demands that the federal government "extinguish" its title to an estimated more than 20 million<sup>3</sup> (or by some reports even more than 30 million<sup>4</sup>) acres of federal public lands in the State of Utah by December 31, 2014.<sup>5</sup> It also calls for the transfer of such acreage to the State and establishes procedures for the development of a management regime for this increased state portfolio of land holdings resulting from the transfer.<sup>6</sup>

Advocates for the TPLA claim that the current federal retention of these public lands deprives the state of revenue that would come from, *inter alia*, (1) the State's receipt of a guaranteed percentage of the proceeds from disposal sales it has expected the federal government to conduct; and (2) the State's ability to tax

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1 UTAH CODE ANN. § 63L-6-101 *et seq.* (2012).

2 All H.B. 148 "Bill Documents" are available at <http://le.utah.gov/-2012/htmldoc/hbillhtm/hb0148.htm>. H.B. 148 as Enrolled is available at <http://le.utah.gov/-2012/bills/hbillenr/hb0148.pdf>.

3 See, e.g., Kirk Johnson, *Utah Asks U.S. to Return 20 Million Acres of Land*, N.Y. TIMES, Mar. 24, 2012, at A9. See also U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2011, 24 (May 2012), available at [http://www.blm.gov/public\\_land\\_statistics/pls11/pls2011.pdf](http://www.blm.gov/public_land_statistics/pls11/pls2011.pdf) (Table 1-4).

4 See, e.g., *Local Republicans Back Fight for Control of Federal Lands*, THE SPECTRUM (St. George, UT), May 4, 2012, at A1.

5 UTAH CODE ANN. § 63L-6-102 (2012).

6 UTAH CODE ANN. § 63L-6-101 *et seq.* (2012).

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property after it is disposed into private hands, whereas while the federal government retains those lands they are exempt from taxation.<sup>7</sup> Moreover, the State has a variety of other arguments it offers for transferring ownership into State hands, including claims that the federal government is a poor manager of the lands and that it has an unwise concept of multiple use, among other things.<sup>8</sup> This White Paper makes no attempt to resolve whether H.B. 148 is good policy in these areas or even whether it will result in an increase in revenue. Instead, it is concerned with conducting an overview of the legal arguments surrounding the legislation and its validity.

Whether the State has the authority to demand that the federal government extinguish rights depends, in large part, on the proper interpretation of the Property Clause in the Constitution. Article IV, Section 3 of the U.S. Constitution provides that: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."<sup>9</sup> This White Paper will consider some of the implications of different theories of the Property Clause on the determination of the TPLA's validity.

H.B. 148, whose chief sponsor was Utah Representative Ken Ivory,<sup>10</sup> represents a new chapter in the long book of wrangling between states in the west

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7 See Constitutional Defense Council, *Toward a Balanced Public Lands Policy, A Case Statement for the H.B. 148: Utah's Transfer of Public Lands Act*, Nov. 2012, at 4 [hereinafter "CDC Nov. 2012 Case Statement"], available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf>.

8 See also Kathleen Clarke, *Finding a Balanced Public Lands Policy*, DESERET NEWS, Nov. 14, 2012, at A12 ("Utah's public lands would be better managed, more productive and more accessible under state stewardship. Current federal land policy and management is inefficient, ineffective and threatens the long-term use and enjoyment of the public lands.").

9 U.S. CONST., Art. IV, Sec. 3.

10 A copy of the bill as introduced, which includes appended to it a Legislative Review Note critical of the bill authored by Utah's Office of Legislative Research and General Counsel, is available at <http://le.utah.gov/-2012/bills/hbillint/hb0148.pdf>.

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and the federal government over natural resources and public lands ownership, control, and management.<sup>11</sup> Thirty-one percent of our nation's lands are owned by the federal government and 63.9 percent of the lands in Utah are owned by the federal government.<sup>12</sup> Of these federal holdings, "[t]he BLM manages nearly 22.9 million acres of public lands in Utah, representing about 42 percent of the state," according to the U.S. Department of Interior ("DOI") Bureau of Land Management ("BLM") Utah State Office website.<sup>13</sup>

Utah's H.B. 148 is a controversial, bold demand made against the federal government and has expectedly raised eyebrows in the political and legal discourse.<sup>14</sup> This White Paper is designed to describe the TPLA and to provide a summary of some of the legal questions related to the enforceability of the State of Utah's demands. While the politics of the demand, the prudence of reallocating ownership, and the practicalities of public lands reforms implicated by H.B. 148 are certainly topics worth analyzing and pursuing, this White Paper will not engage in those fields of discussion.

As Governor Herbert has noted, the legal case for H.B. 148 may not be a "slam dunk,"<sup>15</sup> but there are

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11 As one report explained:

"Private land ownership has been the cornerstone for freedom in this country and economic opportunity. It's one of the blessings we've had as a country when we came here and had for the first time in a universal way the ability to own our own land," [Governor] Herbert said prior to signing the legislation. "And loss of that ownership in fact takes away freedom and liberty to the public and the people. Federal control of our public lands has put us at a distinct disadvantage compared to other states."

Charles Geraci, *Governor Signs Bill That Challenges Feds Over Land Control*, THE HERALD JOURNAL (Logan, UT), Mar. 23, 2012.

12 JAMES RASBAND ET AL., NATURAL RESOURCES LAW & POLICY 141 (2d ed. 2009).

13 U.S. Dep't of Interior, Bureau of Land Management, Utah State Office Homepage, available at <http://www.blm.gov/ut/st/en.html>.

14 See, e.g., Johnson, *supra* note 3, at A9 (reporting reactions to the TPLA).

15 Associated Press, *Utah Law Demands Release of Federal Land*, TULSA WORLD, Mar. 24, 2012, at A11 (quoting Governor Herbert as saying "It's not a slam dunk, but there is legal reasoning and a

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legitimate arguments to support the law and certainly critics of the law overstate their legal case against the law. At the very least, there are open legal questions involved in the TPLA that have never received definitive resolution in the courts.<sup>16</sup> As such, critics cannot make a cut and dry case against the law. In fact, if anything, opposition statements made so far regarding the law may reflect an over-confidence in its unconstitutionality and an overstatement of the strength of precedent. To prevail, Utah's legal case will need to, in part, distinguish some past court decisions. And, in some situations where precedent might seem to weigh against validity of the TPLA demand, Utah may need to make a case for revisiting such interpretations if necessary.

The TPLA has, to date, received a strikingly low level of press coverage and public attention (even inside Utah). Perhaps part of the reason for a low level of news coverage or serious analysis of the TPLA is that people have not taken it seriously. For example, in April 2012, the Secretary of the U.S. Department of Interior is quoted as saying that Utah's law is "nothing more than a political stunt."<sup>17</sup> Despite this perception that some hold, the research leading to this White Paper supports a finding that there are indeed serious legal questions to consider with the TPLA. The legal case for it should not be quickly dismissed. Moreover, other states are

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rational thought process").

16 Utah's Constitutional Defense Council makes this point, stating: "The question of whether the Property or Supremacy Clauses of the United States Constitution permit this unilateral reversal in federal land policy or repudiation of the terms of the State's enabling act is not resolved, because no federal appellate court has directly addressed this issue." CDC Nov. 2012 Case Statement, *supra* note 7, at 4.

For those advocates who wish to advance that there is more than a policy dispute at issue but also a substantive legal claim that must be taken seriously, the next statement by the CDC is troubling, where they state: "However, *the larger and more significant question is whether the shift from disposal to permanent federal retention of a large portion of public lands in the Western States is good public policy today.*" *Id.* (emphasis added). Such public policy concerns are beyond the scope of this White Paper.

17 Matt Canham, *Salazar: Utah just playing politics in land fight*, SALT LAKE CITY TRIB., Apr. 24, 2012 (claiming "Salazar sees it all as nothing but show," and quoting Salazar as saying the Act is only "political rhetoric you see in an election year.").

exploring similar avenues to assert their claims vis-à-vis the federal government and are in various stages of developing land transfer strategies that will model or learn from H.B. 148.<sup>18</sup> That fact further underscores the need for a serious and informed legal discussion on the issues related to disposal obligations of the federal government. This White Paper takes a first step into that discussion.

### I. THE TRANSFER OF PUBLIC LANDS ACT – H.B. 148

The legislation originally known and proposed as H.B. 148, and as enacted known as the Transfer of Public Lands Act and Related Study (“TPLA”), has three basic parts codified in Utah Code §§ 63L-6-101 through 104.<sup>19</sup> These three main parts can be loosely described as the following: (1) the *scope* part explaining the breadth of the TPLA by defining terms and identifying exceptions;<sup>20</sup> (2) the *demand* part;<sup>21</sup> and (3) the pre- and post-extinguishment *planning and management* part, which describes the entities that will govern and prepare for a transition of ownership into State hands.<sup>22</sup>

The “definitions” set out in Utah Code § 63L-6-101, the most significant part of the first portion of the Act, establish the TPLA’s scope by defining what is not included in the demand. It states that “Public lands” means lands within the exterior boundaries of [Utah] *except*,” to one degree or another: private lands, Indian lands, lands held in trust for the state, lands reserved for state institutions, a few other lands with distinct ownership characteristics, and finally and most significantly certain identified federally controlled areas of the State including the National Parks, National Monuments, Wilderness, and several other special-

18 Dianne Stallings, *County Pushes for Interstate Forest Management Plan*, RUIDOSO NEWS, Aug. 14, 2012 (“Bills patterned after Utah’s [H.B. 148] are being prepared for filing next year in Colorado, Idaho, Montana, and New Mexico, according to reports.”); Johnson, *supra* note 3, at A9 (same).

19 UTAH CODE ANN. § 63L-6-101 *et seq.* (2012).

20 *Id.* § 63L-6-102.

21 *Id.* § 63L-6-103.

22 *Id.* § 63L-6-103 & H.B. 148, Sec. 5 (As Enrolled Mar. 16, 2012).

designation federal holdings.<sup>23</sup> Thus, especially as a

23 *Id.* § 63L-6-102 (emphasis added). The TPLA provides:

§ 63L-6-102. Definitions As used in this chapter:

- (1) “Governmental entity” is as defined in Section 59-2-511.
- (2) “Net proceeds” means the proceeds from the sale of public lands, after subtracting expenses incident to the sale of the public lands.
- (3) “Public lands” means lands within the exterior boundaries of this state except:
  - (a) lands to which title is held by a person who is not a governmental entity;
  - (b) lands owned or held in trust by this state, a political subdivision of this state, or an independent entity;
  - (c) lands reserved for use by the state system of public education as described in Utah Constitution Article X, Section 2, or a state institution of higher education listed in Section 53B-1-102;
  - (d) school and institutional trust lands as defined in Section 53C-1-103;
  - (e) lands within the exterior boundaries as of January 1, 2012, of the following that are designated as national parks:
    - (i) Arches National Park; (ii) Bryce Canyon National Park; (iii) Canyonlands National Park; (iv) Capitol Reef National Park; and (v) Zion National Park;
  - (f) lands within the exterior boundaries as of January 1, 2012, of the following national monuments managed by the National Park Service as of January 1, 2012:
    - (i) Cedar Breaks National Monument; (ii) Dinosaur National Monument; (iii) Hovenweep National Monument; (iv) Natural Bridges National Monument; (v) Rainbow Bridge National Monument; and (vi) Timpanogos Cave National Monument;
  - (g) lands within the exterior boundaries as of January 1, 2012, of the Golden Spike National Historic Site;
  - (h) lands within the exterior boundaries as of January 1, 2012, of the following wilderness areas located in the state that, as of January 1, 2012, are designated as part of the National Wilderness Preservation System under the Wilderness Act of 1964, 16 U.S.C. 1131 *et seq.*:
    - (i) Ashdown Gorge Wilderness; (ii) Beartrap Canyon Wilderness; (iii) Beaver Dam Mountains Wilderness; (iv) Black Ridge Canyons Wilderness; (v) Blackridge Wilderness; (vi) Box-Death Hollow Wilderness; (vii) Canaan Mountain Wilderness; (viii) Cedar Mountain Wilderness; (ix) Cottonwood Canyon Wilderness; (x) Cottonwood Forest Wilderness; (xi) Cougar Canyon Wilderness; (xii) Dark Canyon Wilderness; (xiii) Deep Creek Wilderness; (xiv) Deep Creek North Wilderness; (xv) Deseret Peak Wilderness; (xvi) Doc’s Pass Wilderness; (xvii) Goose Creek Wilderness; (xviii) High Uintas Wilderness; (xix) LaVerkin

result of this last exception, most of the federal lands within the State of Utah that have received a heightened status of protection (beyond the more general category of “public lands” that are typically open to multiple use, for example) are not subjects of the TPLA.

The heart of the TPLA is in the “demand” part. Utah Code § 63L-6-103 (1) states: “*On or before December 31, 2014, the United States shall: (a) extinguish title to public lands; and (b) transfer title to public lands to the state.*”<sup>24</sup>

Within the last substantive parts dealing with planning and managing the transfer of lands, the first major provision in Utah Code § 63L-6-103(2) requires that: “If the state transfers title to any public lands with respect to which the state receives title under Subsection (1)(b), the state shall: (a) retain 5% of the net proceeds the state receives from the transfer of title; and (b) pay 95% of the net proceeds the state receives from the transfer of title to the United States.”<sup>25</sup> Thus, if after the State gets the lands back it decides to sell that property to private owners, the division of the proceeds will replicate the same division and school trust commitment that would exist according to the

terms of the Utah Enabling Act<sup>26</sup> had (and as if) the United States sold the property itself.

The final portion of the management part is in the uncodified Section 5 of H.B. 148 where the Act calls for the creation of a Utah Constitutional Defense Council (“CDC”) study to evaluate implementation strategies and develop legislation to plan for the State management of its soon to be acquired lands.<sup>27</sup> As part of this requirement, the CDC published both a “case statement”<sup>28</sup> and a separate “report”<sup>29</sup> in November 2012. These management and implementation portions of the Act, including the division and commitment of proceeds and the CDC report and proposed legislation, are beyond the scope of this White Paper.

The remaining parts of this White Paper will analyze the legal arguments regarding the demand portion of the legislation. Whether and to what extent the State of Utah may demand that the federal government extinguish title to certain of its public lands holdings in the State of Utah will depend on whether the federal government owes the State a “duty to dispose.”

## II. HISTORICAL PREDECESSORS TO THE TPLA/H.B. 148

The long history of conflict over control of lands in the Western states and disputes over the proper level of federal control dates back to the very formation of the new states across the decades after the Revolutionary War.<sup>30</sup> In some ways, the TPLA/H.B. 148 is yet another – although arguably distinguishable – chapter in federal-state tensions and battle for control of the public

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Creek Wilderness; (xx) Lone Peak Wilderness; (xxi) Mount Naomi Wilderness; (xxii) Mount Nebo Wilderness; (xxiii) Mount Olympus Wilderness; (xxiv) Mount Timpanogos Wilderness; (xxv) Paria Canyon-Vermilion Cliffs Wilderness; (xxvi) Pine Valley Mountain Wilderness; (xxvii) Red Butte Wilderness; (xxviii) Red Mountain Wilderness; (xxix) Slaughter Creek Wilderness; (xxx) Taylor Creek Wilderness; (xxxi) Twin Peaks Wilderness; (xxxii) Wellsville Mountain Wilderness; and (xxxiii) Zion Wilderness;

(i) lands with respect to which the jurisdiction is ceded to the United States as provided in Section 63L-1-201 or 63L-1-203;

(j) real property or tangible personal property owned by the United States if the property is within the boundaries of a municipality; or

(k) lands, including water rights, belonging to an Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

UTAH CODE ANN. § 63L-6-102 (2012).

<sup>24</sup> *Id.* § 63L-6-103 (1) (emphasis added).

<sup>25</sup> *Id.* § 63L-6-103 (2).

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<sup>26</sup> UTAH CODE ANN., ENABLING ACT, available at <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

<sup>27</sup> H.B. 148, Sec. 5 (Enrolled Copy (Mar. 16, 2012)), available at <http://lc.utah.gov/-2012/bills/hbillenr/hb0148.pdf>.

<sup>28</sup> See CDC Nov. 2012 Case Statement, *supra* note 7.

<sup>29</sup> Constitutional Defense Council, *A Report on Utah's Transfer of Public Lands Act: H.B. 148 – Presented to Utah State Legislature Interim Committees Natural Resources, Agriculture and Environment, and Education*, Nov. 2012 [hereinafter “CDC Nov. 2012 Report”], available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf>.

<sup>30</sup> See generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968 & photo. reprint 1979).

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lands.<sup>31</sup> A few examples of the historical predecessors to the TPLA are provided below as a sampling of the efforts in Utah and other states that have attempted to wrest ownership, control, and management of lands away from the federal government across the years.

Consider, for example, a 1915 “memorialization” resolution from the Utah Senate to the President, the U.S. Senate, and the U.S. House of Representatives exclaiming Utah’s understanding that the federal government had made a promise to dispose of the public lands it acquired when Utah became a state.<sup>32</sup> That statement, titled Senate Joint Memorial 4, read, in part:

In harmony with the spirit and letter of the land grants to the National government, in perpetuation of a policy that has done more to promote the general welfare than any other policy in our national life, and in conformity with the terms of our Enabling Act, we, the members of the Legislature of the State of Utah, memorialize the President and the Congress of the United States for the speedy return to the former liberal National attitude toward the public domain, and we call attention to the fact that the burden of State and local government in Utah is borne by the taxation of less than one-third the lands of the State, which alone is vested in private or corporate ownership, and we hereby earnestly urge a policy that will afford an opportunity to settle our lands and make use of our resources on terms of equality with the older states, to the benefit and upbuilding of the State and to the strength of the nation.<sup>33</sup>

Several similar resolutions have issued across the years from other states with arguments based on their

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31 This White Paper makes no attempt to provide a survey of these disputes and instead only acknowledges the existence of longstanding and enduring conflicts.

32 Utah S.J.M. No. 4, *A Memorial Asking for a More Liberal Policy in the Disposition of the Public Domain and Urging that the Natural Resources of the State of Utah be Made Available for Development* (Mar. 15, 1915), excerpted and reprinted in CDC Nov. 2012 Report, *supra* note 29, at 17.

33 *Id.*

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compacts and agreements with the federal government where the states believed the federal government has a fiduciary or contractual duty to dispose of its land ownership.<sup>34</sup> As the Utah CDC Report from November 2012 explains, many other efforts stand in the same company as the 1915 resolution:

When the federal government began to move more toward policies of reservation and conservation in the early 1900’s, Utah registered its objections by urging the return to active disposal. At various points throughout the 20th century, Utah restated these objections, particularly upon the passage of FLPMA, wherein the policy shift to one of land retention and preservation became express federal law. For various reasons, mostly political, these prior Utah efforts to restore the benefits contemplated by the Enabling Act have been unsuccessful.<sup>35</sup>

In their claims, many states asserted that the original and longstanding policies in the United States were dedicated to the disposition (not retention) of federal lands,<sup>36</sup> and these states have been concerned when paradigmatic shifts toward retention (and against disposal) seemed to begin.

Across the 20<sup>th</sup> century, there were increasing legislative and regulatory movements toward federal retention of public lands, in many ways critically culminating in the Federal Land Policy and Management Act of 1976 (“FLPMA”) which ultimately provided that “Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless . . . it is determined that disposal

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34 See, e.g., *Granting Remaining Unreserved Public Lands to States: Hearings Before the Senate Committee of Public Lands and Surveys*, 72nd Cong. (1932) (lengthy hearings that documented past state demands and included debate over a policy of returning land to states).

35 CDC Nov. 2012 Report, *supra* note 29, at 6.

36 Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 818 (1980) (explaining that “[d]uring most of our history, the national government pursued a policy of promoting settlement and private development of the public domain.”); see also GATES, *supra* note 30, at 57 (asserting that “the use of the public lands was to be a vital nationalizing factor in American development”).

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of a particular parcel will serve the national interest.”<sup>37</sup> As Rasband notes regarding the gradual shift in public lands policy, “The move toward reservation of public lands . . . was a substantial change in public lands policy. Nevertheless these reservations can still be understood as exceptions to the still prevailing idea that the public lands were largely intended for disposition to private owners.”<sup>38</sup>

In the years immediately before and after the passage of FLPMA, States and their state and federal representatives became increasingly vocal and present with their concerns over federal ownership, management, and control, and they became increasingly bold in their efforts to assert rights or powers over lands within their respective states and assertive in arguing that such claims were superior to federal claims. Due to the volume and seriousness of the political and legal efforts during this period in the late 1960s and 1970s, that era became known (for better or worse) as the “Sagebrush Rebellion.”<sup>39</sup> A variety of legal maneuvers were tried by states and others during this period to diminish federal control over public lands, although none looked exactly like the TPLA. For example, while Nevada passed a law declaring ownership of certain federal lands and while that law was invalidated by a federal district court,<sup>40</sup> the TPLA does not “declare” that Utah owns land and makes no effort to *take* land away

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37 FLPMA, §102(a)(1); 43 U.S.C. § 1701(a)(1).

38 RASBAND ET AL., *supra* note 12, at 139.

39 For a summary of some of the major state and federal initiatives to limit federal ownership or control of lands in the West in what has become known as the “Sagebrush Rebellion,” see RASBAND ET AL., *supra* note 12, at 156-58. See also CDC Nov. 2012 Report, *supra* note 29, at 20-23 (describing the major efforts that occurred at the federal and state level during the Sagebrush Rebellion).

40 See *United States v. Nye County*, 920 F.Supp. 1108 (1996) (applying broad Property Clause power to reject Nevada’s claims of title using Equal Footing theory). In *Nye*, for example, one could argue that the Court *only held* that Nevada went too far because the state claimed ownership outright rather than demanding that the federal government fulfill a duty to dispose or return property to the state. And beyond that, even if one cannot or does not wish to distinguish the cases, the *Nye* case is only the opinion of one district court and therefore has limited precedential effect.

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from the federal government. Instead, the TPLA merely articulates the federal government’s duty to dispose and demands that it comply.

In order to fully understand the current state of affairs in Utah, much more of the history of land disputes would be extremely helpful, and readers are encouraged to explore other sources in this area. In order to keep this White Paper relatively brief, however, any more detailed history will be left to those other avenues of research. But, the TPLA is sufficiently distinct and can be studied effectively in isolation as well. Although some have called the TPLA a “new Sagebrush Rebellion,”<sup>41</sup> the nature of the TPLA is different from measures that have come before it and the new law involves some very unique legal concerns.<sup>42</sup> The next Part deals with a selection of these legal issues.

### III. A LEGAL ANALYSIS OF THE TRANSFER OF PUBLIC LANDS ACT (H.B. 148)

Interest groups from a variety of both supportive and opposition positions are debating the enforceability, and, quite separately, the wisdom of H.B. 148.<sup>43</sup> In light of the fact that there has not yet been much independent

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41 See, e.g., Robert Gehrke, *Senate approves Utah’s new Sagebrush Rebellion*, SALT LAKE CITY TRIB., Mar. 7, 2012.

42 See Johnson, *supra* note 3, at A9 (“This is not your father’s sagebrush rebellion,” said State Representative Ken Ivory . . . referring to the wave of antifederal protests that rippled through the West in the 1960s and ‘70s. “There are very sound legal bases for doing this.”)

43 One of the chief advocacy groups in favor of H.B. 148 is the American Lands Council, led by the chief sponsor of the legislation, Utah Representative Ken Ivory. The American Lands Council provides several key primary documents along with resources designed to support the legislation on their website. See American Lands Council, Resources Page, available at <http://www.americanlandscouncil.org/resources.html>. Another pro-H.B. 148 website with resources is titled “Are We Not a State”, available at <http://www.arenotastate.com/index.html>. One of the primary organizations advocating against H.B. 148 is the Southern Utah Wilderness Alliance (“SUWA”) which makes some resources and commentary available on its website as well. See Southern Utah Wilderness Alliance, *The Facts About HB 148: Unconstitutional, Bad Public Policy and Won’t Help Utah Schools*, Mar. 23, 2012, available at <http://www.suwa.org/2012/03/23/the-facts-about-hb-148-unconstitutional-bad-public-policy-and-won%E2%80%99t-help-utah-schools/>.

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legal analysis published on the TPLA,<sup>44</sup> this White Paper provides a preliminary summary of the legal arguments at issue and presents an initial legal assessment of some of those arguments.<sup>45</sup>

Much of the narrative of Utah's legal case is set forth in documents supporting the legislation. Included in those documents is what amounts to an outline of the State's legal theories best seen in the "whereas" clauses in Utah's House Joint Resolution 3 of March 16, 2012, passed concurrently with H.B. 148.<sup>46</sup>

This section will consider some of that outline, while providing some independent supplemental legal material critical to evaluating the legal legitimacy of the TPLA. The State of Utah may make several arguments to defend its legislation – including those based on the Equal Footing Doctrine, general principles of Federalism, and a *Pollard*-based interpretation of the Property Clause (these theories will be briefly addressed at the end of this section). The State's arguments based

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44 As of this writing in November 2012, only one published law review article or comment *claims* to analyze H.B. 148. See Spencer Driscoll, Comment, *Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Amendment*, 2012 B.Y.U. L. REV. 999 (2012). Although this student paper does have some relevance to understanding developments in disputes between Utah and other states over federal land ownership and control – anyone wishing to analyze H.B. 148 should not rely on the Driscoll Comment. The Driscoll Comment appears to have been written with a separate Utah 2010 eminent domain act in mind, and then, in order to take account of recent events before publication, adds into the paper a reference to H.B. 148 and at times tries to equate the two pieces of legislation but really conflates arguments where only separate analysis will do. As the Comment fails to recognize that H.B. 148 is quite distinct from the 2010 legislation or other past Utah efforts, most of its analysis is non-instructive for those who wish to explore the legal issues with H.B. 148.

45 This White Paper provides only an introductory legal analysis. It does not claim to be comprehensive of all of the available legal arguments for or against the validity of the TPLA. Furthermore, as previously stated, this Paper does not intend to explore the policy reasons for or against the legislation. It also passes no judgment on any other legislation or initiatives designed to adjust the relative positions of the State of Utah and the federal government vis-à-vis the public lands (such as roads lawsuits, eminent domain legislation, and other unrelated (or related but independent) actions).

46 Utah H.J.R. 3, Enrolled Mar. 16, 2012, available at <http://le.utah.gov/-2012/bills/hbillenr/hjr003.htm>.

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on the Utah Enabling Act are its strongest, however, and an analysis of those legal claims will be taken up in the first subsection below.

***A. AN ENFORCEABLE COMPACT/CONTRACT THEORY OF THE UTAH ENABLING ACT ("UEA") WITH A FEDERAL "DUTY TO DISPOSE"***

A contract-based theory – including a compact-based duty to dispose – is one of the strongest arguments that proponents of the TPLA make to support the validity of Utah's demand.<sup>47</sup> The argument includes claims that the TPLA simply enforces a promise made when Utah became a state that the federal government has heretofore seemed unwilling to completely honor and fulfill.<sup>48</sup>

Utah's Enabling Act ("UEA") establishing its

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47 A *New York Times* article – one of the only major, national newspaper articles even touching on any coverage of H.B. 148 – summarized the argument proponents make as the following:

"The federal government, Mr. Ivory and other proponents said, reneged on Congressional promises going back to the 1800s, which held that Washington's control of tens of millions of acres in the West in national forests, rangelands and parks was only temporary. That pledge, they say, was written into contractual obligations in the founding documents of many states, and was followed through in some places but not others. The Midwest and Plains states, for example, are now almost entirely private lands, but hop a meridian or two west and the picture changes completely."

Johnson, *supra* note 3, at A9. This is, in fact, consistent with what can be found in public statements and speeches supporting H.B. 148.

48 An early news report on the TPLA on the day it was signed into law summarized, in part, the State of Utah's likely legal defenses of the Act based on a compact theory of the Enabling Act:

Rep. Ken Ivory, R-West Jordan, and other political leaders have said the bill is an effort to exert rights rooted in the 1894 Enabling Act, which led to Utah's statehood. U.S. Sen. Mike Lee, R-Utah, echoed that point Friday. "When we became a state over a century ago, we were given a promise — a promise that some will insist was explicit in Section 9 of the statehood Enabling Act; others will say (it) was implicit, if not explicit," Lee said. "But the understanding based on what had happened in other states was that eventually the federal government would no longer continue to hold all of this land in perpetuity."

Geraci, *supra* note 11.

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statehood was approved July 16, 1894.<sup>49</sup> Utah ratified its new constitution on November 5, 1895.<sup>50</sup> Where required by the UEA, the Utah Constitution codified certain parts of the UEA, including relevant portions of UEA Section 3.<sup>51</sup> This sub-section of this White Paper will focus on whether the Utah Enabling Act<sup>52</sup> and surrounding circumstances created a duty to dispose on the part of the Federal Government as part of its compact with the State of Utah memorialized in the UEA.

The question becomes whether: (1) inherent in the original compact, the federal government accepted a duty to dispose of the public lands it acquired in the UEA; and separately (2) whether the State of Utah can enforce such a duty by demanding that the federal government live up to its obligation to dispose of such property into private hands. Such a duty would include disposal in a manner that would timely allow the state to obtain/receive/enjoy the benefits of tax revenues and other contributions after the land is unlocked from the limitations on the imposition of taxes against the lands while under federal ownership. Upon disposal, the state can also otherwise obtain the benefits that flow to the State generally from private ownership and investment that is precluded while retained in federal control.

What follows in this White Paper is an analysis of the UEA generally along the lines of this argument. The subsequent discussion then examines the contract-based nature of the UEA, reveals selected instructive historical analyses of enabling acts as enforceable contracts and as creating a duty to dispose, and explains that the legal rules for construction of written instruments requires that the UEA is read and interpreted as a whole document to give effect to the full bargain struck in the agreement.

Longstanding precedents support the theory that the UEA is a bilateral compact that should be treated like it is, and interpreted as, a binding contractual agreement. For one thing, the U.S. Supreme Court

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49 UTAH CODE ANN., ENABLING ACT, available at <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

50 See UTAH CODE ANN., 1953, CONST.

51 UTAH CODE ANN., 1953, CONST. ART. 3.

52 UTAH CODE ANN., ENABLING ACT.

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has consistently held that federal commitments made to the sovereign states at their time of entry into the Union are serious and enforceable.<sup>53</sup>

Furthermore, as the U.S. Supreme Court explained in *Andrus v. Utah*, promises in Enabling Acts are “solemn agreement[s]” which in some ways may be analogized to a contract between private parties.<sup>54</sup> That statement from the *Andrus* majority was also reflected in Justice Powell’s opinion dissenting on grounds unrelated to this matter of interpretation. Justice Powell made note of the relationship between federal retention of lands and less tax revenue,<sup>55</sup> and he then also recognized the agreements within Utah’s Enabling Act and others like it “were solemn bilateral compacts between each State and the Federal Government.”<sup>56</sup> Powell later in his opinion further describes the “bilateral” nature of the compact.<sup>57</sup> As he explained regarding the facts in *Andrus*: “Utah has selected land in satisfaction of grants made to support the public education of its citizens. Those grants are part of the bilateral compact under which Utah was admitted to the Union. They guarantee the State a specific quantity of the public lands within its borders.”<sup>58</sup> And, Powell explained that, in return, the State agreed not to tax the federal lands and agreed to use the lands granted for public education purposes in perpetuity.<sup>59</sup> Both parties had corresponding rights and duties.

Moreover, in *Andrus*, the U.S. Supreme Court also

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53 See, e.g., *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009). The Court in *Office of Hawaiian Affairs* emphasized the importance of federal commitments made at entry into the Union and the inability for Congress after giving State title to act in a manner that clouds that title, explaining:

“[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed.” And that proposition applies a fortiori where virtually all of the State’s public lands . . . are at stake.

*Id.*

54 *Andrus v. Utah*, 446 U.S. 500, 506 (1980).

55 *Id.* at 522-23 (Powell, J., dissenting).

56 *Id.* at 523.

57 *Id.* at 539.

58 *Id.*

11 59 *Id.*

recognized that these compacts anticipate remedies for breach – even against the federal government if it fails to perform duties arising under the compact.<sup>60</sup> Whereas in *Andrus* the Court found an explicit stipulation of the remedy within the compact,<sup>61</sup> under the *Andrus* logic and in terms of failing to perform a duty to dispose, the courts could presumably find that a remedy of some kind (explicitly or impliedly) must exist with the UEA's duty to dispose if it were to find such a duty; and a court would then presumably need to find the TPLA's choice of remedy for dealing with a non-performing federal government reasonable in light of the implicit or explicit provision for such a remedy.

The critical provisions of the UEA for review are in Section 3 and Section 9. The only appropriate way to read these provisions is in conjunction with each other and the whole agreement in the UEA.<sup>62</sup> The U.S. Supreme Court has explained that it is a “cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other.”<sup>63</sup> Moreover, as the Court has also recognized, “For the purposes of construction, we must look to the whole instrument. The intention of the parties is to be ascertained by an examination of all they have said in their agreement, and not of a part only.”<sup>64</sup>

So, we begin our analysis of the text of the UEA by looking at the relevant part of Section 3:

*That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or*

60 *Andrus*, 446 U.S. at 506. In *Andrus*, the Court was considering the compact provision where “[t]he United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.” *Id.*

61 *Id.* at 506-08.

62 E. ALLAN FARNSWORTH, *CONTRACTS* §7.11, at 516 (1990) (explaining that courts favor an interpretation that “gives meaning to the entire agreement”).

63 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

64 *Black v. U.S.*, 91 U.S. 267, 269 (1897).

Indian tribes; *and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States*, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use;<sup>65</sup>

Section 3's “forever disclaim” language leads some to believe that Utah's case for upholding the TPLA is a dead letter. However, it must be read in context.<sup>66</sup> First, even within this section the language shows that the parties anticipate that title will at some point be extinguished (the “until the title thereto shall have been extinguished” language together with the discussion of “disposition”, *i.e.* disposal). When opponents focus only on the “forever disclaim” segment of the UEA and say that this one sentence settles the case against the TPLA, they are looking at “a part only”<sup>67</sup> and “a single sentence”<sup>68</sup> – approaches expressly rejected under the rules of construction recognized in the courts and supported by U.S. Supreme Court precedents explaining

65 UTAH CODE ANN., ENABLING ACT. §3 (emphasis added).

66 Some basic rules of contract interpretation include the following:

A contract must be construed as a whole, and the intention of the parties is to be ascertained from the entire instrument. The contract's meaning must be gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract. All the words in a contract are to be considered in determining its meaning, and the entire contract in all of its parts should be read and treated together. The entire agreement is to be considered to determine the meaning of each part.

17A AM. JUR. 2D *CONTRACTS* § 375 (Nov. 2012).

67 *Black v. U.S.*, 91 U.S. 267, 269 (1897)

68 *Miller v. Robertson*, 266 U.S. 243, 251 (1924) (emphasis added). See also *Secura Ins. v. Horizon Plumbing, Inc.*, 670 F.3d 857, 861 (8<sup>th</sup> Cir. 2012) (“The ‘cardinal rule’ for contract interpretation is to ‘ascertain the intention of the parties and to give effect to that intention.’ The parties’ intent is presumptively expressed by the ‘plain and ordinary meaning’ of the policy’s provisions, which are read ‘in the context of the policy as a whole.’”).

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precisely such rules. The interpretation of any written instrument must be informed by surrounding words and all sections.

Moreover, this language is perfectly consistent with the ends to be achieved. The federal government needed clean title to lands so that it could dispose of these properties to *willing* buyers. There was a fear that potential buyers would be unwilling to purchase lands from either the federal government or the state government if the buyers could not be sure which one had superior title. The UEA resolved that and sent a signal to would-be buyers of the world that the uncertainty of title had been resolved. The State in return also gave a promise that added further certainty to the buyers – the State agreed it did not have the power to interfere with the process of disposal or with rights granted through disposal. The State as part of its obligation under the compact gave the federal government the clean title and agreed not to interfere with the federal disposition—which included not prejudicing the private recipients of title gained through disposal.

It was necessary to give the United States clean title and for the states to accept a duty of noninterference 1) so that the federal government could dispose of property with certainty of title which would be necessary to attract market purchasers; 2) so that in the first instance the United States could directly realize and control the gains from the disposals such that it could use the proceeds in accordance with its commitments made to the original states such as paying off Revolutionary War debts; and 3) so that, because the United States would be successful in disposing of property to willing buyers at full price (*i.e.*, not discounted by uncertainty), the United States could sell at the highest price possible which also benefited the state of Utah because they received a percentage of such sales elsewhere in the UEA, particularly Section 9.

Thus, the State had a selfish interest in wanting the federal government to have certain title because it increased the state's own gains under the agreement. Consider Section 9 of the UEA, which provides:

**SEC. 9.** That *five per centum of the proceeds of the sales of public lands* lying within said State, *which*

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*shall be sold* by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, *shall be paid to the said State, to be used as a permanent fund*, the interest of which only shall be expended for the support of the common schools within said State.<sup>69</sup>

First, by its language Section 9 entitles the State to proceeds from disposals. This means that the State is invested in and *relying upon the existence of disposal*, which, in consideration for this percentage of the proceeds, the State agreed to help facilitate by disclaiming rights to the unappropriated lands so as to give the seller in the disposal market (the federal government) the valuable commodity of certain title attached to the property disposed of.

Basic rules of construction require harmonization of Section 3 with Section 9.<sup>70</sup> By reading the two together, one can see that they generate a “duty to dispose.” If the federal government could retain the property, the State would never get any benefit from Section 9. It is impracticable to believe that the State intended to agree to disclaim rights in return for a cut of the sales of those lands (and in anticipation therefore that actual sales would occur so that there was a cut to be had) yet intended no corresponding obligation that the federal government actually dispose of such lands.<sup>71</sup>

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69 UTAH CODE ANN., ENABLING ACT. §9 (emphasis added).

70 See, e.g., *Southwestern Bell Telephone Co. v. Fitch*, 801 F.Supp.2d 555, 566-67 (S.D. Texas 2011) (explaining that “In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument,” and “To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.”). See also, e.g., *Nicolson Pavement Co. v. Jenkins*, 81 U.S. 452, 456 (1871) (in construing a contract, “effect, if possible, is to be given to every part of it, in order to ascertain the meaning of the parties to it.”).

71 *Mauran v. Bullus*, 41 U.S. 528, 534 (1842) (“In the construction of all instruments, to ascertain the intention of the parties is the great object of the court”); *Haynes v. Hunt*, 85 P.2d 861, 864 (Utah 1939) (“When language is found in the instrument making the grant, fitted to create the grant naturally to be desired by both parties, although not in the usual form of such a grant, it should be given its evidently intended force and

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This interpretation is further strengthened by the words in Section 9 proclaiming that the lands ceded in Section 3 “shall be sold.”<sup>72</sup> This commanding language indicates that disposal was not only anticipated but demanded and expected as a condition of the agreement.<sup>73</sup> This mandatory language removes from the federal government the choice to never dispose and instead retain such lands as were ceded in the previous part of the UEA. The federal retention of these lands deprives the state of revenue which would come from, *inter alia*, (1) the State’s receipt of a guaranteed percentage of the proceeds from disposal sales; and (2) the State’s ability to tax property after it is disposed into private hands, whereas while the federal government retains those lands they are exempt from taxation.<sup>74</sup>

Some may claim that the “disclaim” language in effect.”); *Creason v. Peterson*, 470 P.2d 403, 405 (Utah 1970) (“conveyances of property are to be construed in accordance with the intentions of the parties”).

72 UTAH CODE ANN., ENABLING ACT. §9 (emphasis added).

73 The U.S. Supreme Court has repeatedly called such language “the mandatory ‘shall.’” See, e.g., *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 66-61 (2007) (describing Clean Water Act “shall approve” language as creating a mandatory obligation on EPA to approve a state program when listed statutory triggering criteria were met, citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress’ “use of a mandatory ‘shall’ . . . to impose discretionless obligations”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (“[T]he mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion”); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive”); BLACK’S LAW DICTIONARY 1375 (6th ed. 1990) (“As used in statutes . . . this word is generally imperative or mandatory”).

74 The CDC Case Statement explained that the disposal was anticipated in the Enabling Act and required if the State of Utah is to receive the “benefit of its bargain.”:

The required disposal of the public lands by the United States over time was a significant *benefit of the bargain* made by the State of Utah with the federal government at the time of statehood. In addition to the future expectation of taxable lands, Utah was also promised 5% of the proceeds from the sale of the public lands held by the federal government “which shall be sold” following statehood. . . .

CDC Nov. 2012 Case Statement, *supra* note 7, at 4.

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Section 3 should be read as meaning that the federal government received the title free and clear of any encumbering duties and that it therefore can retain such public lands designated in the UEA. So long as the property is *unencumbered* then perhaps the statement that the government may retain or refrain from disposing holds true. However, the principle argument in favor of the TPLA is that it calls for the disposal of lands that by the very nature of their acquisition came with an encumbrance attached – a compact and promise made between two sovereigns where the federal government committed itself to disposal and promised that it would exercise its disposal obligations in a manner (and with an understanding that respects the expectation by the State that the federal government would dispose of such lands) so that both a percentage of the proceeds from the sales would be shared with the State and the State thereafter would have the capacity to tax such lands when disposed into private hands. Utah’s claim seems more than reasonable in light of these promises in Section 9.<sup>75</sup>

75 Some analogies help demonstrate that demands of this type are not unprecedented in law. Beneficiaries of trusts, for example, have rights to demand an account from a trustee. GEORGE GLEASON BOGERT, *LAW OF TRUSTS AND TRUSTEES* §§963 *et seq.* (2d rev. ed. 1983 & Supp. 2009) (describing trustees’ duties to render formal accounts for trust property and assets upon demand of beneficiary or others, including to “learn whether the trustee has performed his trust and what the current status of the trust is” and in some instances upon completion of the accounting to order transfers of property). In many ways the federal government has an obligation to both Utah and the original States who gave the Western lands to the federal government in trust that they would use them for limited purposes and ultimately dispose of them. The federal government has a fiduciary duty to dispose of the property and do so in a reasonable amount of time. Where their delay or refusal to dispose puts the beneficiary in a lesser position – far from the duty to seek to maximize the best interests of the beneficiary – it is violating its fiduciary duty.

Consider also the existence of “lapse” statutes in some states. Another interesting analogy to the Utah effort is the passage of “lapse” statutes in some states where legislation ends interests in certain mineral estates within split estates where the mineral estate holder fails to use the mineral estate for a certain period of years. With such statutes, ownership generally reverts to the owner out of which the lesser estate is carved. The statutes are intended to encourage the productive use of property. Particularly where

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Utah would not be the first to advance this interpretation of the “consideration” included in such structuring of the provisions in an enabling act. In 1828, for example, Representative Joseph Duncan of Illinois delivered a Report to Congress from the Committee on Public Lands.<sup>76</sup> In that Report, Duncan contended that the states, by terms of the rather uniform enabling acts, expected disposal to occur. Duncan identified a duty to dispose of federally held lands in consideration for the state’s having given up rights to such properties and for surrendering the rights to tax such properties and obtain revenue.<sup>77</sup> His statement argued, in part:

If these lands are to be withheld, which is the effect of the present system, in vain may the People of these States expect the advantages of well settled neighborhoods, so essential to the education of youth . . . Those States will, for many generations, without some change, be retarded in endeavors to increase their comfort and wealth, by means of works of internal improvements, because they have not the power, incident to all sovereign States, of taxing the soil, to pay for the benefits conferred upon its owner by roads and canals. *When these States stipulated not to tax the lands of the United States until they were sold, they rested upon the implied engagement of Congress to cause them to be sold, within a reasonable time.* No just equivalent has been given those States for a surrender of an attribute of sovereignty so important to their welfare, and to an equal standing with the original States.<sup>78</sup>

This is a well-stated interpretation of these

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the surface estate holder, for example, expects royalties from the use of the dormant mineral estate, that surface owner’s ability to receive profits from their own estate is impeded by the non-productive use of the mineral estate. Such lapse statutes have been seen as a way to more efficiently allocate valuable and scarce resources to those that can profit from them, and such statutes have been upheld as legitimate exercises of state power. See, e.g., *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

<sup>76</sup> See, e.g., Public Lands Committee Report, 20th U.S. Congress, 1st Session, House of Reps., Rep. No. 125, *Graduate Price of Public Lands*, February 5, 1828.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (emphasis added).

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compacts, supporting reading Sections 3 and 9 together as part of a whole agreement that includes corresponding duties and considerations where both parties receive the benefit of their bargain.

As Farnsworth explains, courts should err on the side of an interpretation that ensures that each party receives the benefit of the bargain struck in the written instrument.<sup>79</sup> The State of Utah can be treated fairly under the UEA with some benefit of the bargain protected *only if it can impose a duty to dispose*, as explicitly included in Sections 3 or 9 or as implicitly mandated within a comprehensive reading of the whole of the UEA.<sup>80</sup> If the federal government does not dispose of the public lands then the State will not receive its anticipated percentage of the proceeds of sales and will be unable to realize taxation and productivity benefits from the private owners and their uses of the property.

There is also a strong argument that the intent and expectations of the State of Utah and the federal government at the time of the UEA were informed by the predominant ethic in favor of, and presumptions toward, the disposal of federally controlled public lands into private hands.<sup>81</sup> These expectations and

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<sup>79</sup> E. ALLAN FARNSWORTH, *CONTRACTS* §7.11, at 517 (1990) (explaining a rule of construction that “the assumption is that the bargaining process results in a fair bargain, so that, between an interpretation that would yield such a bargain as a reasonable person would have made and one that would not, the former is preferred.”).

<sup>80</sup> Cf. *Flood v. ClearOne Communications, Inc.*, 618 F.3d 1110, 1125 (10<sup>th</sup> Cir. 2010) (“The intention of the parties to a contract ‘must be gleaned from a consideration of the whole instrument.’ . . . And in seeking that intention, ‘an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.’”).

<sup>81</sup> James R. Rasband & Megan E. Garrett, *A New Era in Public Land Policy? The Shift Toward Reacquisition of Land and Natural Resources*, 53 ROCKY MTN. MIN. L. INST. §11.02[1] (2007) (“Beginning in 1776 and continuing for most of the nineteenth and into the twentieth century, the primary goal of the United States was to dispose of as much public land as possible”); Touton, *supra* note 36, at 818 (explaining that “[d]uring most of our history, the national government pursued a policy of promoting settlement and private development of the public domain.”). Touton explains that, “In admitting new states . .

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circumstances must be considered in interpreting whether one can find a duty to dispose in the UEA.

The expectation of disposal dates back to the intentions at the Constitutional Convention and the promises made to the original states that the unappropriated lands would be disposed of. Consider the congressional resolution passed on October 10, 1780:

Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, . . . shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states . . . That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled.<sup>82</sup>

Utah became a State during this disposal era in public lands law. The U.S. Supreme Court has explained that “The intention of the parties is to be gathered, not from [a] single sentence [], but from the whole instrument read *in the light of the circumstances existing at the time of negotiations leading up to its execution.*”<sup>83</sup> The UEA was entered into against a backdrop of an ethic of disposal. Consequently, this ethic informed the expectations of the parties and is relevant in interpretation.<sup>84</sup>

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. Congress retained ‘unappropriated lands’ within their borders and *continued its policy of encouraging settlement and development.* Nearly all of the land in the Midwest and South was distributed in this manner.” *Id.* (emphasis added).

82 18 JOURNALS OF THE CONTINENTAL CONGRESS 915-16 (1780) (congressional resolution of October 10, 1780).

83 *Miller v. Robertson*, 266 U.S. 243, 251 (1924) (emphasis added).

84 See E. ALLAN FARNSWORTH, *CONTRACTS* §7.10, at 511 (1990) (“The overarching principle of contract interpretation is that the court is free to look to all of the relevant circumstances surrounding the transaction.”); *Semi-Materials Co., Ltd. v. MEMC Electronic Materials, Inc.*, 655 F.3d 829, 833 (8<sup>th</sup> Cir. 2011) (“When interpreting a written contract under Texas law, the court is ‘to ascertain the true intent of the parties as expressed

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The disposal ethic constitutes a relevant “state of affairs” that must be considered a critical element in the interpretation of a compact like the UEA,<sup>85</sup> and it lends support to an interpretation, of the *whole* document, that mandates disposal. The pro-disposal climate that existed while the UEA and similar state agreements were reached supports the claim that the State of Utah reasonably believed that, by making other concessions in the UEA, it would later receive consideration for its disclaimed rights in the form of payments from Section 9. As Farnsworth explains in his treatise on contracts, “[i]t seems proper to regard one party’s assent to the agreement with knowledge of the other party’s general purposes as a ground for resolving doubts in favor of a meaning that will further those ends, rather than a meaning that will frustrate them.”<sup>86</sup> Utah “assented” to the UEA with knowledge of the federal government’s “general purposes” of disposal and finding a meaning in the UEA that includes a duty to dispose furthers the ends anticipated by the parties including the revenue stream from disposal considered in Section 9. Finding disclaimed rights by the State with no corresponding duty to dispose would be to adopt a meaning that frustrates the expectations of the parties to the UEA (principally the State of Utah and the federal government), and unjustly give the federal government

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in the instrument.’ To make this determination, we ‘examine all parts of the contract and the circumstances surrounding the formulation of the contract.’”)

85 *Chesapeake & Ohio Canal Co. v. Hill*, 82 U.S. 94, 100, 103 (1872) (describing the rule that the court give a contract “a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements,” and that such interpretation should “be in accordance with the substance of the agreement. It would carry out the intent of the parties as gathered from the whole instrument *and the state of affairs existing at the time it was made.*” (emphasis added)).

86 E. ALLAN FARNSWORTH, *CONTRACTS* §7.10, at 513 (1990). See also *Wood v. Ashby*, 253 P.2d 351, 353 (Utah 1952) (“It is also established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed,” and “the circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered.”); *RESTATEMENT (SECOND) OF CONTRACTS* §202(1) (“if the principal purpose of the parties is ascertainable it is given great weight.”).

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a greater benefit than that for which they bargained. Again, the parties' interests within the agreement require the existence of some duty to dispose on the part of the federal government.

The compact-based duty-to-dispose theory is, furthermore, supported by past statements of officials recognizing its logic and historical underpinnings. For example, President Andrew Jackson made an eloquent and persuasive defense of the compact-based duty to dispose in a pocket veto message to Congress where he refused to sign legislation passed by Congress that would have used proceeds from disposing of public lands for certain general federal purposes rather than complying with terms of disposal set out in compacts between the federal government and certain states.<sup>87</sup> Jackson believed that the legislation was based on improper assumptions of federal power vis-à-vis the lands subject to the bill and the bill failed to recognize the necessity of permanent disposals of federal public land holdings.<sup>88</sup>

Jackson's veto message stressed the need for a permanent resolution of public lands disposition and "the importance, as it respects both the harmony and union of the States, of making, as soon as circumstances will allow of it, a proper and final disposition of the whole subject of the public lands."<sup>89</sup> Jackson started his rather long statement with a history lesson on "the manner in which the public lands upon which it is intended to operate were acquired and the conditions upon which they are now held by the United States."<sup>90</sup> He explained that the original states were induced into ceding their land to the federal government by the promise that the federal government would eventually dispose of all of these lands. For example, the deed of cession from Virginia provided that the lands "*shall be faithfully and bona fide disposed of for that purpose, and*

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87 Andrew Jackson, Veto Message of December 4, 1833, reprinted in 3 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 56-69 [hereinafter "Jackson 1833 Veto Message"]. For a copy of the veto message available on the internet, see <http://www.presidency.ucsb.edu/ws/index.php?pid=67041>.

88 *Id.*

89 *Id.* at 57.

90 *Id.*

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*for no other use or purpose whatsoever.*"<sup>91</sup>

Jackson described the commitment to dispose in agreements with the original states as "solemn compacts" where "[t]he States claiming those lands acceded to those views and transferred their claims to the United States upon certain specific conditions, and on those conditions the grants were accepted."<sup>92</sup> By vetoing the bill and articulating this interpretation of the federal duty to dispose, Jackson was looking out for the interests of "new States" and their interest in "the rapid settling and improvement of the waste lands within their limits."<sup>93</sup>

Jackson concluded his veto message with a strong statement that the agreements with the original states for cession of their rights to Western lands and the commitments made to new states could only be read as creating a duty to dispose and an obligation to "abandon" the property that the federal government cannot, or no longer has a financial need to, dispose of:

I do not doubt that it is the real interest of each and all the States in the Union, and particularly of the new States, that the price of these lands shall be reduced and graduated, and that after they have been offered for a certain number of years the refuse remaining unsold shall be abandoned to the States and the machinery of our land system entirely withdrawn. *It can not be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value,*

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91 *Id.* at 60.

92 *Id.* at 60-61. The binding nature of these compacts was further touched upon by Jackson:

The Constitution of the United States did not delegate to Congress the power to abrogate these compacts. On the contrary, by declaring that nothing in it "*shall be so construed as to prejudice any claims of the United States or of any particular State,*" it virtually provides that these compacts and the rights they secure shall remain untouched by the legislative power, which shall only make all "needful rules and regulations" for carrying them into effect. All beyond this would seem to be an assumption of undelegated power.

*Id.* at 64.

93 *Id.* at 68 (emphasis added).

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*and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States.*<sup>94</sup>

These statements by Jackson support a theory that the federal government must at some point “extinguish” their claims to title to the public lands obtained in the enabling acts.

Importantly, Jackson concludes that nothing in existing law precludes this interpretation of the duty to dispose – almost saying that in the absence of a barrier to this interpretation, and given that the interpretation makes sense, one should accept his interpretation. No law would be broken.<sup>95</sup> If nothing precludes the interpretation that the federal government must extinguish its rights to these public lands at issue, yet many general principles favor an interpretation that identifies a duty to dispose, Jackson counsels that the latter interpretation in favor of disposal should be chosen. That may be wise counsel for those vacillating on whether to embrace a duty to dispose.

The CDC’s summary of its legal theory supporting the TPLA makes some of the arguments articulated and analyzed in the subsection above in this White Paper. The CDC’s theory is based, in part, on an expectation of disposal within enabling acts, colored by a sense of fairness for the states like Utah where disposal has yet to occur (while others had the disposal commitment largely carried through).<sup>96</sup> The Report contends the following:

Legal justification for the transfer of the public lands into State ownership is based on the history of federal land policy. From the inception of this Nation and through much of its history, it was the policy of the federal government to dispose of the public lands both to pay off federal debt and to encourage the settlement of western lands for the benefit of the states and the nation. Indeed, most of the states east of the Colorado-Kansas state line

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<sup>94</sup> *Id.* at 68-69.

<sup>95</sup> *Id.* at 69 (“This plan for disposing of the public lands impairs no principle, violates no compact, and deranges no system.”).

<sup>96</sup> CDC Nov. 2012 Case Statement, *supra* note 7, at 3-4. While the CDC report presents its theory of legal validity it does not seem intended to be a detailed legal analysis.

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have very little federal public lands within their borders as a result of the historical implementation of this policy. This policy of disposal was very much a part of the various enabling acts that authorized new states to join the Union.<sup>97</sup>

Furthermore, the CDC Case Statement explained that the Enabling Act’s “disclaimer of title was only intended to facilitate the disposal of the public lands so that, eventually such lands would contribute to the revenue bases of federal, State and local governments.”<sup>98</sup> Once title passes into private hands from federal, that property becomes subject to state regulation.<sup>99</sup>

One problem with the legal analysis presented in this subsection from a “public relations”-type standpoint (if there is such a thing in law) lies in the following: 1) the courts have had occasion to discuss states’ obligations under these compacts and in that process courts have even contended that these are *bilateral* contractual agreements – meaning the federal government has some duties too; but 2) the courts have had very little occasion to consider and discuss interpretations of the compacts which identify the duties imposed upon the other half of the *bi-lateral* agreement, the federal government. Thus, opponents to the TPLA invoke broad statements about federal power when the States overstep in relation to the compacts and call them “precedents” for the present case of the TPLA’s legitimacy. These opponents highlight these broad statements even though the language used in those cases went beyond what was necessary to the holdings in those cases and are therefore of little to no precedential value.

But on the other side of the debate, advocates favoring the TPLA hold almost *no* directly-responsive “precedential” cards – real controlling precedent or even dicta pretending-to-be precedent – as there are almost no cases about the states’ powers when the

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 4.

<sup>99</sup> *Irvine v. Marshall*, 61 U.S. 558, 567 (1857) (“(but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States.”).

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federal government oversteps its obligations or fails to fulfill its promises in these compacts. The advocates of laws like the TPLA must employ the power and skill of distinguishing cases and educate the courts and the public about when some seemingly precedential judicial statements are distinguishable or are actually dicta. The next subsection dissects some of the most often touted precedential obstacles to upholding the TPLA.

***B. DISTINGUISHING CASES AND IDENTIFYING DICTA: THE LIMITED LEGAL COMMENTARY AND ARGUMENTS AGAINST THE VALIDITY OF THE TPLA***

The major legal arguments against the TPLA rest on broad interpretations of the Property Clause in the U.S. Constitution Article IV, Section 3. This constitutional provision provides: “The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.”<sup>100</sup> Setting aside the validity or invalidity of any of the arguments made by TPLA opponents in relation to other and separate measures taken by the State of Utah or others to realize state control of currently federally held lands, the primary arguments made against the TPLA miss their target and the authorities relied upon by TPLA opponents are almost entirely inapposite.

The Property Clause does indeed confer broad powers to Congress, but it is not without limitations. This section accomplishes two main goals. First, it deconstructs the lofty and overbroad language in several cases that opponents of the TPLA claim as dispositive precedent. This section will focus on distinguishing the seemingly broad interpretations of the Property Clause that are claimed to weigh in favor of finding the TPLA invalid or unconstitutional. This section does so by looking at the cherry-picked bits of language offered by opponents within the full context of the cases where the language appears. It will examine these bits of language in light of the limited holdings in the cases where such language appeared but was not necessary to resolve the cases. It also will identify many of these broad “interpretations” as nothing more than non-controlling

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100 U.S. CONST., Art. IV, Sec. 3.

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dicta. Second, this section will reiterate the idea that the UEA and its duty to dispose act as *limitations* on the Property Clause power, the likes of which were never considered or discussed in any of the cases where broad Property Clause powers were heralded.

Much of what is being cited as “precedent” against the TPLA is not precedent at all. Instead, much of this claimed precedent resides in categories of excessive dicta. At times, courts say in a case opinion more than is necessary to resolve the case. They can be verbose and sometimes they overstate background principles. And sometimes in the process they use excess language that is susceptible to interpretations beyond what the judges would have meant to say had they been able to fully predict the misuse of their words. Critics of the TPLA have been focused on making largely conclusory statements that the TPLA is invalid,<sup>101</sup> and where they cite to cases, such critics have often relied on nothing more than distinguishable dicta.

Consider, for example, a research note attached to H.B. 148. On February 4, 2012, the Utah Office of

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101 Consider, for example, one of the only major national news articles to cover the TPLA that makes some bold statements about the law’s chances of being upheld if challenged. See Johnson, *supra* note 3, at A9. Johnson’s article reports on failures of past efforts by States to restrain federal power over Western lands in light of broad precedent in favor of the federal government’s Property Clause powers. *Id.* He also then claims that “[m]any legal experts say they expect the same result this time.” *Id.* Furthermore the article proceeds to claim that “Legal experts said the problem for the new state claims was that Congressional authority over federal land had been upheld over and over by the United States Supreme Court. If property rights are the issue being raised, many experts said, proponents of the new land drive are facing traditions and precedents that run deep in the law and culture.” *Id.*

I do not doubt that many legal experts will rely on the breadth of dicta in sometimes seemingly relevant case precedent and find that Utah faces an uphill battle. However, opponents should not rely too much on the Johnson article for their claim of legal illegitimacy. That article proceeds to identify and quote only one expert, Professor Charles F. Wilkinson of the University of Colorado. *Id.* As there seem to be very few experts publicly weighing in on the issue so far in any manner, I think the “most experts” claim in the article is probably unsupported (although I make no claim to know how many legal academics will line up against the law should it start to receive more attention and therefore cause such legal commentators to form an opinion).

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Legislative Research and General Counsel appended its “Legislative Review Note” to the introduced version of H.B. 148 “as required by legislative rules and practice.”<sup>102</sup> Despite the near conclusive effect some opponents of the legislation have tried to give the Legislative Review Note, the authors specifically explain that the Note is designed to “provide information relevant to legislator’s consideration of this bill” and not to “influenc[e] whether the bill should become law” and it is “not a substitute for the judgment of the judiciary” on the constitutionality of the TPLA.<sup>103</sup>

After citing the Property Clause, the Legislative Review Note relies on statements in *United States v. Gratiot*,<sup>104</sup> *Kleppe v. New Mexico*,<sup>105</sup> and *Gibson v. Chouteau*.<sup>106</sup> The Legislative Review Note concludes that, in light of these precedents and “[u]nder the *Gibson* case, that requirement [in H.B. 148 of the federal government to extinguish title] would interfere with Congress’ power to dispose of public lands. Thus, that requirement, and any attempt by Utah in the future to enforce the requirement, have [sic] a high probability of being declared unconstitutional.”<sup>107</sup>

A closer look at each of the cases cited in the Legislative Review Note reveals that they do not support that legal conclusion and prediction. The Note starts with this claim:

The Supreme Court of the United States has held that “Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . .” *United States v. Gratiot*, 39 U.S. 526, 537 (1840). See also *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell

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102 Utah Office of Legislative Research and General Counsel, Legislative Review Note (Appended to H.B. 148 as Introduced, Feb. 4, 2012 [hereinafter “H.B. 148 Legislative Review Note”], available at <http://le.utah.gov/-2012/bills/hbillint/hb0148.pdf>.

103 *Id.*

104 39 U.S. 526, 537 (1840).

105 426 U.S. 529 (1976).

106 80 U.S. 92 (1872).

107 H.B. 148 Legislative Review Note, *supra* note 102.

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federal land, and any legislation Congress enacts “necessarily overrides conflicting state laws under the Supremacy Clause.” *Kleppe*, 426 U.S. at 543. See U.S. Const. art. VI, cl. 2.

These quotations from case law are valueless for the interpretation of the TPLA and certainly create no controlling precedent to be applied in any challenge to the TPLA.

*Gratiot*, for example, does little to inform an interpretation of the TPLA. Its holding was that the Property Clause “authorize[s] the leasing of the lead mines on the public lands, in the territories of the United States” the terms of which would be enforceable and it also stands for the proposition that property rights created prior to statehood could not be upset by a new state.<sup>108</sup> There is nothing in *Gratiot* that would require a determination that Congress has plenary power under the Property Clause so broad that it may ignore all other possible duties to states or others. This “without limitation” language is only dicta unnecessary to resolve the case. And as the facts have no similarity to the questions regarding the TPLA, the *Gratiot* case seems of little value in any legal controversy over the TPLA.

Similarly, *Kleppe* has limited value in any TPLA dispute and the Note’s reliance on it is misplaced. *Kleppe* simply holds that a state law allowing the state to come onto federal land and rustle up and later auction burros is unconstitutional because it interferes with federal management policies while the federal government is an owner of public lands.<sup>109</sup> The holding says nothing either in favor of or against giving Congress a power to ignore other commitments to dispose of property like it made in the UEA.

The *Kleppe* holding simply maintains that *while* the federal government is an owner, states have a type of “duty of noninterference” with federally controlled lands (including refraining from passing laws that conflict with the federal policies while the federal government occupies such lands).<sup>110</sup> If a state passes a

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108 *Gratiot*, 39 U.S. at 524.

109 *Kleppe*, 426 U.S. at 546.

110 *Id.* at 540-41. See also Touton, *supra* note 36, at 825 (discussing *Kleppe* and concluding with yet another argument

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law that so interferes, then it will be subject to conflict or other preemption doctrines and the Supremacy Clause will indeed make the federal law control over the state one.<sup>111</sup> But again, there was no need to grant Congress some truly “unlimited” Property Clause power to reach this holding in *Kleppe*. In the *Kleppe* case, unlike in a challenge to the TPLA, there were no other relevant laws (comparable to, for example, the UEA) to consider other than the interfering municipal law that was invalidated.

It is true that with conflict preemption in the *Kleppe* case, the Supremacy Clause mandated that the federal law over burros win out against a state law over burros that was in conflict.<sup>112</sup> But that holding says nothing of whether the state can demand that the federal government honor its promises and perform its duties. And it says nothing about when and whether, if the state is the beneficiary of those promises, there can be an enforceable demand for adherence.

The Legislative Review Note also quoted at length from the U.S. Supreme Court’s 1872 decision in *Gibson v. Choutou*:

The Supreme Court of the United States has ruled that “[w]ith respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted to the Union, that such interference with the

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primary disposal of the soil of the United States shall never be made.” *Gibson v. Chouteau*, 80 U.S. 92 (1872).<sup>113</sup>

The Legislative Review Note and most opponent arguments seem to focus on the claim in *Gibson* that “No State legislation can interfere with this [Property Clause] right or embarrass its exercise.”<sup>114</sup> *Gibson* does not, however, resolve the issue of whether the TPLA violates the Property Clause.

*Gibson* only held that a state cannot interfere with a disposal and incident to what might be called a “duty of noninterference with disposal” on the part of the state that there is also a prohibition on the state “depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.”<sup>115</sup> The *Gibson* decision equates any measure a state takes to deprive the transferee of “the right to possess and enjoy the land,” with “a denial of the power of disposal in Congress.”<sup>116</sup> While *Gibson* demonstrates that a state may not interfere with U.S. ownership or interfere with disposal – such as by adversely affecting the buyers’ market for government property by creating discriminatory or disadvantaging rules on purchasers of federal government disposed property<sup>117</sup> – it does not speak to whether a state may nonetheless demand that the federal government follow through on promises made to the state to eventually dispose in some manner or another the property it holds rather than to retain it.

Consider also another case, *Irvine v. Marshall*, not discussed in the Legislative Review Note but nonetheless could be claimed to support opponents of the TPLA.<sup>118</sup> While *Irvine* indicated broad authority for the federal government over its property in the Territories “to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem

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that “[a]lthough the *Kleppe* decision was unanimous, its assertion that the property power is “without limitations” should not be accepted uncritically. The property power, like all other congressional powers, is circumscribed by external limitations found in the Bill of Rights and elsewhere in the Constitution.”)

111 *Kleppe*, 426 U.S. at 539-40.

112 *Id.* at 546.

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113 Legislative Review Note, *supra* note 102.

114 *Gibson*, 80 U.S. at 99.

115 *Id.* at 100.

116 *Id.*

117 *Id.*

118 61 U.S. 558 (1857).

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most advantageous to the public fisc, or in other respects most politic,”<sup>119</sup> all of that language *still anticipates* disposal and merely constrains State power to interfere with the government *while it owns* the public lands or *in the legally effective transfer* of such lands. The focus in *Irvine* was on questions regarding “in what mode, and by what title, the public lands shall be conveyed” – the mechanics of effective disposal that should remain in the discretionary control of the federal government while it owns lands – but *Irvine* hints at nothing about the power to retain public lands (and especially those lands encumbered with a duty to dispose) indefinitely.

The holdings in all of these cases relied upon in the Legislative Review Note (or in those cases similar to these selected cases that may be used by opponents to the TPLA) state that, when the federal government acts as it is empowered to act, the states may not impede the federal powers to manage the public lands nor may they intervene to diminish the federal government’s capacity to dispose. These holdings are about *not interfering* when the federal government has *discretion* to act and it is operating within that discretion; these holdings say nothing at all about whether the state may demand that the federal government comply with an affirmative duty to act.

A similar legislative review memorandum was written in the State of Wyoming designed to inform the Wyoming Legislature about the consequences of adopting legislation in that state similar to Utah’s TPLA.<sup>120</sup> This is one of the few other legal analyses that this Author has found regarding the constitutional validity of the TPLA. It is a very short and conclusory analysis, relying (like the Utah Legislative Review Note) on overbroad and inapplicable dicta to make its point. The memorandum quotes *United States v. Gratiot* and it also relies upon broad Supremacy Clause language

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119 *Id.* at 561-562.

120 Memorandum from Josh Anderson and Matt Obrecht, Wyoming Legislative Service Office Staff Attorneys, to Members of State of Wyoming Legislature Minerals Committee, *Utah Land Transfer of Public Lands Act, Utah 2012 HB 148*, October 9, 2012 (on file with Author) [hereinafter “Wyoming Legislative Memo”] (“memorandum discusses likely conflicts with the United States Constitution and the Constitution of the State of Wyoming if a similar piece of legislation [to H.B. 148] were introduced and passed in Wyoming.”).

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in *Kleppe* and *Gibson*.<sup>121</sup> The flaws in those analogies are described above.

But the Wyoming memo also uses a few cases not discussed in the Utah Legislative Review Note<sup>122</sup> – most important among these are *Shannon v. United States*,<sup>123</sup> *Utah Power & Light Co. v. United States*,<sup>124</sup> *United States v. Gardner*,<sup>125</sup> and *Light v. United States*.<sup>126</sup> In addition, the case cited in *Light – Camfield v. United States*<sup>127</sup> – must be discussed as it serves as the origin for one of the most often used claims of plenary retention power for Congress vis-à-vis the public lands.

Each of these cases, like the others discussed above, can be distinguished from any arguments related to the TPLA. *Shannon* had only a limiting holding not relevant to the facts of the TPLA. The appeals court there held that the State of Montana through its laws could not grant its citizens a right to pasture on federal public lands and in essence authorize a trespass.<sup>128</sup> So long as the government held the lands and had not yet disposed of the lands, it may maintain a trespass action against such individuals.<sup>129</sup> Before getting to that limited holding, the court in *Shannon* repeated some of the rhetoric on broad federal powers but it had neither the occasion nor the necessity to evaluate the limits of such powers in the face of separately identifiable constraints on the power.

*Utah Power & Light* only held that a state could not interfere with the federal government’s use and enjoyment of its property while the federal government owned the property and therefore the state’s attempt to exert the power of easement over federal lands was

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121 *Id.*

122 *Id.* The memorandum also has some rather unsupportable points such as an argument that “shall” can be voluntary and not mandatory. *See id.*

123 *Id.* (citing 160 F. 870, 874 (9th Cir. 1908)).

124 *Id.* (citing 230 F. 328, 339 (8th Cir. 1915), *modified on other grounds*, 242 F. 924 (1917)).

125 107 F.3d 1314, 1318 (9th Cir. 1997).

126 220 U.S. 523, 536 (1911).

127 167 U.S. 524 (1897).

128 *Shannon*, 160 F. at 875.

129 *Id.*

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invalid.<sup>130</sup>

*Gardner* was a case holding that “[t]he United States was not required to hold public lands it received in various treaties with foreign nations or sovereign tribes for the establishment of future states.”<sup>131</sup> Although *Gardner* cited the language in *Light* regarding Congress’s power to withhold property from sale, that language had no bearing on the holding in *Gardner*.<sup>132</sup>

In *Light* too, the Court there made a few seemingly broad statements about the reach of the Property Clause.<sup>133</sup> The following paragraph is the one from which *Gardner* quotes and the one most likely to be cited by TPLA critics:

But ‘the nation is an owner, and has made Congress the principal agent to dispose of its property. . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.’ *Butte City Water Co. v. Baker*, 196 U.S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211. ‘The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.’ *Camfield v. United States*, 167 U.S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864.<sup>134</sup>

The holding in *Light*, however, is quite limited. The *Light* opinion used that broad rhetorical language only as dicta in reaching a far narrower and unexceptional holding that the federal government had the power – like any owner – to expel trespassers.<sup>135</sup> *Light* simply borrowed the broad language to reach its holding that the federal government “may . . . as an owner, object to its property being used for grazing purposes, for ‘the government is charged with the duty and clothed with the power to protect the public domain from trespass

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130 *Utah Power & Light Co.*, 230 F. at 339.

131 Wyoming Legislative Memo, *supra* note 120.

132 *Gardner*, 107 F.3d at 1318.

133 *Light*, 220 U.S. at 536-37.

134 *Id.* at 536.

135 *Id.* at 537.

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and unlawful appropriation.”<sup>136</sup>

Similarly, in *Camfield* where the Court first used the unnecessarily verbose language of “may sell or withhold them from sale,”<sup>137</sup> that case was also about trespassers on federal lands. The Court used the quoted language in a long paragraph discussing incidents of ownership, but leading to a holding that did not reach anywhere near the issue of whether the federal government has discretion to withhold lands from sale where it might otherwise have committed itself to dispose of such lands.<sup>138</sup> The *Camfield* holding can be summarized loosely as saying the following: The fact that the federal government has not yet sold (or, to phrase it differently, has currently withheld from sale) a parcel does not mean that a private individual can just step in and claim and put a fence around the property and call it his own simply on the defense that the federal government has not sold it.<sup>139</sup> That hardly amounts to a holding that creates a precedent for a sweeping and plenary power on the part of the federal government to withhold from sale any public lands it wishes to retain. And of even further importance, the *Camfield* Court had absolutely no occasion to consider the powers of the United States in light of independently existing duties or commitments to dispose like what the federal government entered into with the states like Utah.

Other Property Clause cases are similar to those discussed here – with almost nothing to say about a duty-to-dispose theory and instead focusing on what a state may do while the federal government is an owner.<sup>140</sup> There is a difference between interference with administration of federal holdings or interference with

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136 *Id.* at 536.

137 *Camfield*, 167 U.S. at 524.

138 *Id.* at 528.

139 *Id.* at 525-26.

140 See, e.g., *Wyoming v. United States*, 279 F.3d 1214, 1227 (10<sup>th</sup> Cir. 2002) (applying *Kleppe* to determine Congress’s legislative or management power over public lands is plenary); *United States v. Utah Power & Light Co.*, 209 F. 554, 557 (8<sup>th</sup> Cir. 1913) (explaining that federal government can control public lands as part of its protection over property that it could dispose of and “[h]aving the power of disposal and protection, Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title.”)

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the disposition process and a quite distinct demand for *some* disposition by the federal government in adherence with its own promises.

Most of the cases decided across the years under the Property Clause have focused on the state's obligations and commitments under the compacts – such as the obligation not to intervene in Federal use or disrupt the sanctity of federal disposal agreements – but very little case law has examined the flip side of the compacts: the obligations and commitments agreed to by the federal government. A compact is not a one way street. Because the broad and lofty statements of federal powers regarding public lands have been made in cases analyzing whether states have interfered with federal prerogatives rather than whether the federal government has made a commitment that requires the federal government itself to take certain affirmative steps – that case law can be distinguished and at the very least should not be so over-stated as conclusive of the issues at play with the validity or constitutionality of the TPLA.

The statements by courts that states cannot interfere in federal affairs *while* the federal government owns property do not necessarily say anything about whether the federal government has a duty to dispose of that property in some manner and at some point in time. It is the latter duty that is embodied in the demand made by the State of Utah in the TPLA.

### ***C. THE EQUAL FOOTING DOCTRINE, FEDERALISM, POLLARD-BASED INTERPRETATION OF THE PROPERTY CLAUSE POWER AND OTHER LEGAL ARGUMENTS***

The State of Utah may have some additional theories to defend the TPLA beyond the compact-based duty to dispose. Primary among these theories would be those that rely on the Equal Footing Doctrine and general Federalism principles,<sup>141</sup> along with a narrow

<sup>141</sup> For a summary of these doctrines, see generally Touton, *supra* note 36. Consider also the Northwest Ordinance, proclaiming that:

to provide also for the establishment of States,... and for their admission to a share in the federal councils on an equal footing with the original States ... The legislatures of those ... new States, shall never interfere with the primary

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interpretation of the Property Clause power envisioned in language from the U.S. Supreme Court's 1845 decision in *Pollard v. Hagan*.<sup>142</sup>

The Equal Footing Doctrine and Federalism principles can serve two purposes for those advocating for the TPLA's validity. First, these principles could simply be employed as background principles that color an interpretation of the Enabling Act that finds the existence of a compact-based duty to dispose. These principles could help support efforts to resolve any ambiguities in the Enabling Act. These policies generally weigh in favor of greater state autonomy and can therefore be used to assist distinguishing the inapposite cases where broad federal powers were stated to exist (when litigating compact-based *duties of noninterference*) from a compact-based *duty to dispose*. That distinction is discussed in the previous subsection. Such a duty to dispose is designed, like these principles, to limit federal power. Importantly, these Equal Footing and Federalism doctrines may not be necessary to find a duty to dispose on a compact theory of the Enabling Act, but these principles could help tip that theory towards the State's position if there is some reluctance to accept an interpretation finding a compact-based duty to dispose.

Separately and independently, the Equal Footing Doctrine and/or basic tenets of Federalism might create independent duties for the federal government requiring it to dispose of public land holdings wholly apart from

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disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers ..."

THE NORTHWEST ORDINANCE (1787), *reprinted in 2 DOCUMENTS OF AMERICAN HISTORY* 130 (Henry Steele Commager ed., 8th ed. 1968); *see also* UTAH CODE ANN., ENABLING ACT, *available at* <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>. ("AN ACT to enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States.").

142 44 U.S. (3 How.) 212 (1845) ("Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.").

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(and perhaps in addition to) a compact-based duty to dispose arising from the Enabling Act. There are strong arguments from the original understanding and purpose of the Equal Footing and Federalism Doctrines to support the State.<sup>143</sup> However, the State will need to distinguish the TPLA from the broad precedents that seem to reject a narrower reading of the Property Clause adopted in *Pollard* – in much the same way this White Paper has described they should be distinguished in relation to the compact-based duty to dispose. Moreover, they will need to overcome the limitations on the breadth of the Equal Footing doctrine recognized in some courts.<sup>144</sup>

This White Paper will not fully analyze the strengths and weakness of these additional theories, but the argument in favor of the TPLA from *Pollard* will be *briefly* introduced here nonetheless. *Pollard* involved a question of whether the United States had the power to grant title to certain tidelands in the Mobile Bay in Alabama.<sup>145</sup> The Court was required to evaluate the effect of Georgia's cession of the Alabama territory to the United States which was done in the first instance to help the United States satisfy Revolutionary War debts.<sup>146</sup> The Court's discussion of the issues lead to a very limited interpretation of the Property Clause – what one scholar has called “breathtaking in its scope”

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143 See generally, e.g., Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 696 (1981); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 43 (1949) (“[The landholding relation] is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone.”); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 254 (1976) (“Every expansion of the property clause increases the power of the federal government at the expense of the states’ authority, and by the traditional jurisprudence of federalism that is cause for unease.”).

144 See, e.g., *Nevada v. United States*, 512 F.Supp. 166, 171-72 (D. Nev. 1981) (in suit challenging constitutionality of FLPMA provisions, court holds equal footing doctrine does not cover economic equality of states, different impacts in different states is acceptable under doctrine, broad language to the contrary in *Pollard* was dicta, and citing *Light* that it may sell or withhold from sale).

145 *Pollard*, 44 U.S. at 212.

146 *Id.*

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if it were to be controlling.<sup>147</sup> The Court reasoned that the federal government acted as a mere proprietor in relation to these lands, and it would have a duty to sell its holdings in Alabama if that state was to be on an equal footing with other states, and that the Property Clause merely “authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.”<sup>148</sup>

The *Pollard* opinion includes broad language that federal land holdings were always meant to be temporary and that the Property Clause gives no separate authority for the federal government to retain ceded Western lands.<sup>149</sup> The Court explained:

[T]he United States never held any municipal sovereignty, jurisdiction or right of soil in and for the territory, of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana.<sup>150</sup>

As Rasband describes it, according to *Pollard*, the Property Clause:

was not intended to give the United States authority to keep and regulate public lands. Instead, the Property Clause was something like temporary management authority pending the final sale and disposition of the public lands that would make Alabama a full sovereign. According to *Pollard*, the Constitution provided only one way for the United States to obtain complete authority over public land and that way was the Enclave Clause.<sup>151</sup>

However, many cases after *Pollard* have taken a broad view of the Property Clause that is contrary to

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147 RASBAND ET AL., *supra* note 12, at 99.

148 *Pollard*, 44 U.S. at 224.

149 *Id.*

150 *Id.*

151 RASBAND ET AL., *supra* note 12, at 98.

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*Pollard's* language. Rasband contends in part correctly that courts "were so easily able to dismiss *Pollard's* narrow view of federal power to retain and regulate land within the states [because] it was dicta."<sup>152</sup> Another argument, however, is that most courts even when taking a broad view of the Property Clause have not had to confront the issues of federal duties that exist to constrain its powers discussed in *Pollard* and instead those courts have only had to resolve issues of state interference with clear and non-duty-constrained federal powers. Any *Pollard*-based argument will need to distinguish those subsequent cases discussed in previous parts that call for a near-limitless Property Clause power.

There may be several ways to accomplish this task of differentiation and this White Paper leaves the bulk of that research to future projects. For now, consider just one example. A reasonable case for reconciling *Pollard* and cases like *Kleppe* can be made based on the following methodology:

The inconsistency between *Pollard* and *Kleppe* may best be resolved by recognizing the equal footing doctrine as a continuing limitation on the exercise of the property power, not merely as a limit on Congress's power to impose conditions on the

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152 *Id.* at 99. Rasband et al. further summarize some of the hurdles of the *Pollard*-dependent argument as follows:

In the end, invocations of *Pollard* and the equal footing doctrine must be understood in context. Sometimes the reference is to the well-established rule that the United States will be presumed to have held land under navigable water in trust for the future state unless it very plainly indicates a contrary intent. In other cases, talk of *Pollard* and the "equal footing doctrine" refers to its constitutional holding that new states must enter the Union on an equal sovereign footing. This is still basic constitutional law, although as subsequent courts have clarified, equal footing applies to political rights and sovereignty, not to economic or physical characteristics of the states." *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997), cert. denied, 522 U.S. 907 (1997). See also *Coyle v. Smith*, 221 U.S. 559 (1911) . . . In still other cases, invocations of equal footing are an argument from *Pollard's* dicta that the federal government should not be able to retain and regulate land within the states except under the Enclave Clause. It is this argument that forms the legal core of the Sagebrush Rebellion and wise use movement . . ."

*Id.* at 101.

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admission of states. *Pollard* clearly indicates that the federal government may not retain land when such retention gives it plenary power to displace state autonomy. Accordingly, Congress may not use the property power to infringe the municipal sovereignty of the Western states, because such infringement would be the direct result of federal usurpation of a prerogative of the original states: ownership of unappropriated lands.

Under this reasoning, *Pollard's* broad language would still be operable even in a post-*Kleppe* world. The student-note author of this reconciliation theory continues:

While courts have no power to force congressional disposal of lands, they should not allow Congress to use the property power in such a way as to destroy "the constitutional equality of the States . . . essential to the harmonious operation of the scheme upon which the Republic was organized." This view, while imposing definite limits on the property power, need not unduly hamper legitimate federal programs in the Western states. Congress can, of course, purchase land anywhere in the nation for governmental purposes and, under *Kleppe*, exercise broad powers over that land.<sup>153</sup>

This is one good starting point for researching these theories and developing arguments along these lines. As stated above, any such arguments will require further research and testing against the full breadth of

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153 Touton, *supra* note 36, at 837-38. Touton continues that such a theory would leave the federal government with substantial opportunities to still own and control land if it wishes:

Congress, through exercise of its powers as landowner, still has substantial power over federal land held since statehood. . . . Even as to federal land uses not clearly supportable by any enumerated federal power, Congress can seek to acquire exclusive federal legislative jurisdiction under the federal enclave clause. The Western states have routinely consented to such jurisdiction over national parks and similar areas. It seems likely, therefore, that the proposed approach would have no practical effect on federal attempts to further legitimate national, governmental goals.

*Id.*

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available case law.

Alternatively, the State (rather than distinguishing seemingly contrary case law from the wisdom of *Pollard*) may simply need to convince the courts to re-embrace the historical findings and dicta from *Pollard* that led to a narrow reading of the Property Clause in that case and lead the *Pollard* Court to describe a broad mandate for federal disposal of its land holdings; and, if that is the situation, the State will need to convince the court to reject some otherwise controlling precedents, if any, that embrace a broader Property Clause power. This approach, as well as a full assessment of its strength as a matter of law, would require a substantial amount of additional legal investigation and research beyond the scope of this White Paper.

Finally, even if it turns out that there is a strong historical or originalist argument favoring a duty arising under the doctrines of Equal Footing or Federalism, litigation success on such theories will undoubtedly be difficult. Given the relative breadth of the rhetoric (or perhaps precedent) on the broad Property Clause power theories – viewed together with a general increasing deference toward federal control and plenary federal power in our constitutional system – it may be difficult to predict a State victory on these power-curtailement theories in the courts. That reality again makes a compact-based duty to dispose a seemingly stronger argument for those seeking to uphold the TPLA.

#### ***D. A FEW THOUGHTS ON JUSTICIABILITY CONCERNS***

Aside from the arguments on the merits, should the Federal government fail to comply with Utah's demand in the TPLA and the State of Utah wishes to sue on the theories that support that demand, the State will need to evaluate potential justiciability hurdles that might preclude enforcement in the courts.<sup>154</sup> Further

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<sup>154</sup> For example, the *Light* Court discusses enforcement of federal government trusts primarily through political accountability not the courts:

'All the public lands of the nation are held in trust for the people of the whole country.' *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or

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analysis of this issue would be necessary should such a lawsuit come to pass.

However, even if the TPLA's enforceability were determined non-justiciable, the inability to use the federal courts to enforce a duty does not eviscerate the existence of the duty itself. The federal government would still have an independent obligation to live up to its commitments, but it would require political will on the part of legislators and pressure applied and accountability demanded by the electorate. There are many obligations in our constitutional scheme that require self-enforcement by political actors out of their oath and constitutional duties, irrespective of whether a court order can compel the action.

#### **CONCLUSION**

Utah's Transfer of Public Lands Act presents fascinating issues for the areas of public lands, natural resources, and constitutional law. There are credible legal arguments supporting Utah's demand that the federal government extinguish certain public lands within the State. At the very least, it seems clear that the law is not "clearly" unconstitutional as some opponents contend.

This White Paper has provided an overview of the legal arguments on both sides of the TPLA debate. In the end, there is a credible case that rules of construction favor an interpretation of the Utah Enabling Act that includes some form of a duty to dispose on the part of the federal government. Other theories may also



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grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.

*Light*, 220 U.S. at 537; *Kleppe*, 426 U.S. at 536 ("we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."). Nevertheless, the courts have adjudicated disputes involving alleged state violations of compact terms and *Kleppe* does recognize that "courts must eventually pass upon" Property Clause disputes. Without further research and analysis, this White Paper takes no position on how the courts might or should deal with these justiciability issues.

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support the TPLA demand. At a minimum, the legal arguments in favor of the TPLA are serious and, if taken seriously, the TPLA presents an opportunity for further clarification of public lands law and the relationship between the states and the federal government regarding those lands.



The Federalist Society for Law & Public Policy Studies  
1015 18th Street, N.W., Suite 425 • Washington, D.C. 20036

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**From:** Rep. Steve Thompson  
**Sent:** Monday, March 23, 2015 12:25 PM  
**To:** Helen Phillips  
**Subject:** FW: HB 115 question

Please add to HB 115

-----Original Message-----

**From:** Fogels, Edmund J (DNR) [mailto:ed.fogels@alaska.gov]  
**Sent:** Saturday, March 21, 2015 9:18 AM  
**To:** Mark A Neuman; Rep. Steve Thompson  
**Cc:** Peterson, Darwin R (GOV); Tom Wright; Sanborn, Courtney L (DNR); Rep. Dan Saddler  
**Subject:** HB 115 question

Co-Chair Thompson and Co-Chair Neuman,

During the hearing on HB 115 last Monday, Representative Saddler asked me about Section 2(b) of CSHB 115, and specifically asked two questions:

-Is there any summary of amounts or injuries that might be identified in this section? (More specifically: what are the injuries or amounts claimed by the federal Government?)

-Is there any estimate of the potential value of such injuries?

To our knowledge, there is no summary of amounts or injuries that might be identified in this section. However, I am prepared to give two prominent examples:

- 1) ANWR. By preventing the exploration and potential development of the oil and gas resources in the Arctic National Wildlife Refuge, the federal government has caused significant economic injury to the state by depriving the state of revenue, estimated at between \$94.8 billion and \$210.0 billion.
- 2) Tongass National Forest: Federal policies and management practices fail to provide sufficient timber supply for Southeast's timber industry. As a result, the downward spiral of the Southeast timber industry has adversely affected Southeast communities, schools and local economies. An industry that once supported over 5,000 jobs in this sector has shrunk to a few hundred. During the past twenty years, six communities have seen their schools close due to low student enrollment, which in many cases is directly or indirectly related to the health of the forest products industry.

I hope this information is useful for the committee. Please let me know if I can provide any additional information.

Respectfully,

Ed Fogels  
Deputy Commissioner  
Alaska Department of Natural Resources  
(907) 269-8431

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**From:** Jane Pierson  
**Sent:** Friday, March 20, 2015 11:33 AM  
**To:** Helen Phillips  
**Subject:** FW: Relevant documents involving HB115, the federal land transfer bill  
**Attachments:** Utah alone after AZ veto.pdf

Please add this to HB 115 Opposing Documents

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**From:** Rep. Steve Thompson  
**Sent:** Friday, March 20, 2015 7:44 AM  
**To:** Jane Pierson  
**Subject:** FW: Relevant documents involving HB115, the federal land transfer bill

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**From:** Lois Epstein [[mailto:lois\\_epstein@tws.org](mailto:lois_epstein@tws.org)]  
**Sent:** Thursday, March 19, 2015 4:43 PM  
**To:** Rep. Mark Neuman; Rep. Steve Thompson  
**Cc:** Rep. Dan Saddler; Rep. Bryce Edgmon; Rep. Lynn Gattis; Rep. Cathy Munoz; Rep. Lance Pruitt; Rep. Tammie Wilson; Rep. Les Gara; Rep. David Guttenberg; Rep. Scott Kawasaki; Rep. Mike Hawker; Rep. Mike Chenault  
**Subject:** Relevant documents involving HB115, the federal land transfer bill

To the House Finance Committee co-chairs: Hello. I am closely following HB115 and welcome the opportunity to testify, if possible. Additionally, could you please post the following two documents on BASIS to better inform members of the legislature and the public prior to the hearing on Monday:

- 1) Arizona Governor Jan Brewer's 2012 veto letter of a similar federal land transfer bill: <http://www.azleg.gov/govletter/50leg/2R/SB1332.pdf>, and
- 2) The attached article regarding the Utah bill which Speaker Chenault says is the model for HB115.

Thank you very much for your help with this request, and please feel free to contact me at any time.

Lois Epstein

**Lois N. Epstein, P.E.**

Engineer & Arctic Program Director

**The Wilderness Society**

work: 907.272.9453, x107| cell: 907.748.0448

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*We protect wilderness and inspire Americans to care for our wild places*

# Utah alone in Sagebrush Rebellion after Arizona governor's veto

By Robert Gehrke The Salt Lake Tribune

Published May 15, 2012 11:27 pm

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**Politics • Arizona governor vetoes bill to take back public lands.**

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Utah stands alone — so far, at least — in its bid to take public lands from the federal government, after Arizona Gov. Jan Brewer vetoed similar legislation and other states have yet to join the fight.

"Obviously, it's disappointing," said Rep. Ken Ivory, R-West Jordan. "We have work to do with the [Arizona] governor so, between now and the next legislative session, she and both houses of the Legislature are on board."

The Arizona governor, who has a reputation for being something of a conservative firebrand, vetoed the bill Monday, citing a host of concerns with the legislation.

In her letter to legislative leaders, Brewer wrote that the legislation appeared to be "not reconcilable" with the U.S. Constitution and Arizona's Enabling Act and that it would create uncertainty for holders of leases on federal lands.

Brewer also said that, if Congress were to transfer control of the land to the state, Arizona would be on the hook for up to \$23 million in costs to manage the land, and that it is premature to put fixed dates for action into statute until the state has met its other funding needs.

"As a staunch advocate for state sovereignty, we still must be mindful and respectful of our federal system," Brewer wrote. "I understand and share Arizona's frustration in trying to manage our natural resources with our various partners; however, this legislation is not the answer."

In short, Brewer relied on the same arguments that opponents of similar legislation in Utah raised when the bill demanding Congress turn over nearly 30 million acres of federal land passed the Legislature and was signed by Gov. Gary Herbert.

"I will not speculate about her motives. Arizona faces their own unique circumstances," Herbert said. "Bottom line: Utah put the federal government on notice — we simply want them to honor the commitment they made at the time of statehood. That commitment in our enabling legislation was to dispose of the public land."

Herbert said the goal is to optimize economic development and find the right balance of multiple use of the public lands.

The bill, philosophically, draws its inspiration from the Sagebrush Rebellion in the West in the late 1970s and a proposal that was put forward by the American Legislative Exchange Council, a business-backed legislative group, in the mid-1990s.

The failure in Arizona, along with a similar measure that failed to get out of a House committee in Colorado, is a setback to the vision Utah lawmakers had of cobbling together a Western coalition to press the issue and share the potential litigation costs.

"As many states as possible, that helps our cause," said Senate Majority Whip Wayne Neiderhauser, R-Sandy, the Senate sponsor of Utah's bill. "But it's a legal issue, not just a political support issue."

Ivory said it will take an education process around the West to make sure lawmakers and governors understand the issue. He said the bill is not unconstitutional.

"This is going to be a process. Nobody pretends otherwise, but we're in a situation where we can't take, 'No' for an answer," said Ivory, speaking from New Mexico, where he was working on promoting the legislation.

He said he had just come from Colorado, where he had similar meetings with lawmakers there, and then planned to head to Idaho to make the pitch to colleagues there.

Sen. Al Milken, the sponsor of the Arizona legislation, has already said that he plans to bring it back next year, Ivory said, and he expects Idaho, Wyoming and Montana to consider legislation and are among the most likely to pass it.

Last month, Idaho Gov. Butch Otter said that the state should demand that the federal government keep its promises, but questioned if the demands Utah is making would pass legal muster.

"You could pass all the legislation in Idaho you want, but if it's not going to be recognized by the courts or Washington, D.C.," it could be futile, Otter said.

Steve Bloch, an attorney with the Southern Utah Wilderness Alliance, said it is a futile quest — one that Arizona's governor saw through.

"We're not surprised that Governor Brewer vetoed Arizona's companion bill," he said. "The legislation, like Utah's legislation, is ill-conceived and has no basis in law or fact. The state of Utah should focus its efforts on real solutions to funding schools — things like addressing severance tax — and leave these legal gambits behind."

gehrke@sltrib.com (mailto:gehrke@sltrib.com) Twitter: @RobertGehrke —

From Arizona Gov. Jan Brewer veto message

• "As a staunch advocate for state sovereignty, we still must be mindful and respectful of our federal system. The legislation appears to be in conflict or not reconcilable with U.S. Constitution Article IV, Section 3, Clause 2 and Article VI, Clause 2, as well as the Enabling Act."

- "I also am concerned about the lack of certainty this legislation could create for individuals holding existing leases on federal lands. Given the difficult economic times, I do not believe this is the time to add to that uncertainty."
- "Despite the claim that this bill has no fiscal impact, I believe there is a significant and unaccounted for fiscal impact associated with this legislation. If Arizona received the 23 million acres of federal lands contemplated by this legislation, the Arizona State Land Department would need approximately \$23 million in additional dollars and an untold increase in staff and resources."
- "I understand and share Arizona's frustration in trying to manage our natural resources with our various partners; however, this legislation is not the answer."



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#### ARTICLE PHOTO GALLERY



([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-0.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-0.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-1.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-1.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-2.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-2.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-3.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-3.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-4.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-4.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-5.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-5.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-6.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-6.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-7.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-7.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-8.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-8.jpg)) ([http://archive.strib.com/images/2012/0515/sagebrush\\_051612-9.jpg](http://archive.strib.com/images/2012/0515/sagebrush_051612-9.jpg))



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## ALASKA MINERS ASSOCIATION

121 W. FIREWEED SUITE 120 | ANCHORAGE, ALASKA | 99503 | 907.563.9229 | ALASKAMINERS.ORG

March 18, 2015

Representative Mark Neuman  
Representative Steve Thompson  
House Finance Committee  
State Capitol Building  
Juneau, AK 99801

Re: HB115

Dear Representative Neuman and Representative Thompson:

The Alaska Miners Association thanks you for the opportunity to comment on HB115, an Act relating to the sovereignty of the State and the transfer of public lands.

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 members that come from seven statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials.

Access to and across lands within the State of Alaska has been a top priority of the Alaska Miners Association for many years. In far too many instances, access to our mineral deposits, inholdings, or other vital land bases has been impeded by federal regulation, adverse policy, Presidential Orders and negative decisions.

Indeed, AMA publishes an annual "Issues of Concern" document, outlining the most important issues pertaining to mining activity in Alaska. A critical item at the forefront of the document details, "Finalize land conveyances to the State and Alaska Native Corporations and lift all Federal withdrawals and public land orders established by the Secretary of Interior under the Alaska National Interest Lands Conservation Act and Alaska Native Claims Settlement Act." These withdrawals need to be lifted in order to open federal lands to mineral entry under federal mining laws. The most recent version of this bill, CSHB115, addresses this point by requiring the United States government to lift certain land orders and federal withdrawals, ultimately delivering the promised acreage of lands at Statehood and at the time of passage of those two landmark pieces of Legislation.

The transfer of lands to the State of Alaska is in the best interests of Alaskans and allows the lands to be managed in a multiple use manner, with the maximum benefit to the people, as is required by our Constitution. We urge you to pass HB115 as swiftly as possible.

Thank you for the opportunity to comment on this important issue.

Sincerely,

Deantha Crockett  
Executive Director

# Alaska State Legislature

State Capitol, Room 208  
Juneau, Alaska 99801-1182  
Phone: 907-465-3779  
Fax: 907-465-2833  
Toll Free: 800-469-3779



145 Main St. Loop  
Second Floor  
Kenai, Alaska 99611  
Phone: 907-283-7223  
Fax: 907-283-7184

## REPRESENTATIVE MIKE CHENAULT SPEAKER OF THE ALASKA STATE HOUSE

### SPONSOR STATEMENT

**Committee Substitute for House Bill 115 (RES):** *"An Act relating to sovereignty of the state and the state's right to a credit for amounts or injuries inequitably or unlawfully caused or claimed by the federal government; requiring the United States to lift certain land orders and federal withdrawals; relating to the transfer of public land or interests in public land from the federal government to the state and the disposal of that land or any interest in land; and providing for an effective date."*

Committee Substitute for House Bill 115 (RES) enacts the Alaska Sovereignty and Transfer of Federal Public Lands to Alaska Act. The bill requires that the United States to transfer title to public lands to Alaska on or before January 1, 2017. The bill also affirms Alaska's state sovereignty under the Ninth and Tenth Amendments to the U.S. Constitution.

Although there are a number of state and federal constitutional issues regarding the provisions contained within the bill, this bill was introduced since the 35-year deadline from the time Alaska was admitted into the Union as provided within the Statehood Act, PL 85-508, is long past. I believe there is a breach of good faith since the state is still entitled to and awaiting the transfer of the remaining 5.5 million acres. Thus far the state has received patent to about 99.5 million acres.

Currently, the state has 10.9 million acres of selections from which to receive its 5.5 million acres of entitlement as well as 10.2 million acres of top-filings that may eventually become selections should applicable withdrawals be lifted. These withdrawals come in numerous varieties of federal action and processes. Two common executive branch actions that create withdrawals are Public Land Orders (PLOs, issued by the Department of the Interior) and Executive Orders issued by the President.

The committee substitute for House Bill 115 (RES) requires the federal government to turn over all lands held by the federal government to the state subject to acceptance by the state with the exception of lands used for military purposes including military reservations.

At this time according to the Department of Natural Resources, there are approximately 222 million acres within Alaska under federal ownership.

This bill is modeled after Utah legislation, HB 148.

# Alaska State Legislature

State Capitol, Room 208  
Juneau, Alaska 99801-1182  
Phone: 907-465-3779  
Fax: 907-465-2833  
Toll Free: 800-469-3779



145 Main St. Loop  
Second Floor  
Kenai, Alaska 99611  
Phone: 907-283-7223  
Fax: 907-283-7184

## REPRESENTATIVE MIKE CHENAULT SPEAKER OF THE ALASKA STATE HOUSE

### **Ninth Amendment**

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

### **Tenth Amendment**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

# LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 13, 2015

**SUBJECT:** Constitutionality of a state law requiring the federal government to transfer certain lands to the state (Work Order No. 29-LS0587A)

**TO:** Representative Mike Chenault  
Speaker of the House  
Attn: Donald Bullock

**FROM:** Alpheus Bullard   
Legislative Counsel

This note accompanies the bill described above. The bill directs the federal government to relinquish certain federal lands on certain terms. The bill is unconstitutional.

The state disclaimed all right and title in property belonging to the United States at the time the state achieved statehood. Article XII, sec. 12, Constitution of the State of Alaska substantially incorporates sec. 4 of the Alaska Statehood Act.<sup>1</sup> Article XII, sec. 12 reads as follows:

**Disclaimer and Agreement.** The State of Alaska and its people *forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union.* The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. *The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.* They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

(Emphasis added.)

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<sup>1</sup> *Aquilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska (1976) (48 U.S.C. Prec. Sec. 1 has been substantially incorporated into art. XII, sec. 12, Constitution of the State of Alaska)).

Even if the state had the power to order the federal government to transfer federal public land to the state, the order could not be based on any interest in that land retained by the state after achieving statehood. That interest was disclaimed at statehood. Where ownership or a right-of-way is in dispute, the appropriate remedy would be to pursue a quiet title action. See, for example, *Alaska v. United States*,<sup>2</sup> where the state filed an action against the federal government to resolve the state's interest in submerged land in Glacier Bay and parts of Southeast Alaska.

Please also note that the substance of the bill you requested is subsumed by the broader provisions of AS 38.05.500 - 38.05.505, the codified provisions of an initiative passed in 1982<sup>3</sup> that purports to gain control of federal land in the state on the following findings in AS 38.05.500:

**Sec. 38.05.500. Electorate determinations.** The people of the State of Alaska determine that:

(1) the intent of the framers of the Constitution of the United States was to guarantee to each of the states sovereignty over all matters within its boundaries except for those powers specifically granted to the United States as agent of the states;

(2) the attempted imposition upon the State of Alaska by the Congress of the United States of a requirement in the Statehood Act that the State of Alaska and its people "disclaim all right and title to any land or other property not granted or confirmed to the state or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States," as a condition precedent to acceptance of Alaska into the Union, was an act beyond the power of the Congress of the United States and is thus void;

(3) the purported right of ownership and control of the public land in the State of Alaska by the United States is without foundation and violates the clear intent of the Constitution of the United States; and

(4) the exercise of that dominion and control of the public land in the State of Alaska by the United States works a severe, continuous and debilitating hardship upon the people of the State of Alaska.

The provisions in AS 38.05.500 - 38.05.505 have never been implemented. In 1983, the Attorney General advised the commissioner of natural resources that the initiative, popularly known as the "Tundra Rebellion", was unconstitutional under art. XII, secs. 12

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<sup>2</sup> 545 U.S. 75, 125 S.Ct 2137, 162 L.Ed.2d 57 (2005).

<sup>3</sup> 1982 Initiative Proposal No. 5.

Representative Mike Chenault  
February 13, 2015  
Page 3

and 13, Constitution of the State of Alaska.<sup>4</sup> The commissioner followed the advice in the opinion, and the State has not implemented the provisions enacted by initiative.<sup>5</sup>

If you have questions, please do not hesitate to contact me.

TLAB:dla  
15-079.dla

Enclosure

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<sup>4</sup> 1983 Att'y Gen. Op. No. 2, 1983 Alas. AG LEXIS 365 (February 18, 1983).

<sup>5</sup> Although the Attorney General opined that the law enacted by the initiative is unconstitutional, AS 38.05.502 has been cited by some as the codification of the public trust doctrine, a common law principle that the state has the responsibility of a trustee to its citizens as beneficiaries of the state's resources. AS 38.05.502 reads as follows:

**Sec. 38.05.502. Property of the people.** Subject to valid existing rights of applicants for land, upon February 21, 1983, all land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state.



# LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature  
Division of Legal and Research Services  
State Capitol, Juneau, AK 99801

(907) 465-3991 phone  
(907) 465-3908 fax  
research@akleg.gov

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## Research Brief

TO: Representative Mike Chenault  
FROM: Chuck Burnham, Legislative Analyst  
DATE: February 19, 2015  
RE: Federal Lands in Alaska and Land Transfers under the Statehood Act  
*LRS Report 15.257*

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*You asked how much federal land exists within Alaska that is not part of a national park, monument, or historic site, military installation, or municipality. You also wished to know how much land the State was granted for selection under the Alaska Statehood Act, how much of that land has been transferred by the federal government, and how the land claims of Alaska Natives impact State land selections.<sup>1</sup>*

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According to the Alaska Department of Natural Resources (DNR), Division of Mining, Land, and Water, there are currently approximately 222 million acres of land within Alaska under federal ownership as follows:

Bureau of Land Management	74.7 million acres
Wildlife Refuges	69.4 million acres
National Parks	53.8 million acres
National Forest	21.9 million acres
Department of Defense	2.2 million acres

To answer the first part of your question directly, based on the above categories of land, there appear to be roughly **96.6 million acres of federal land** in Alaska outside of national wildlife refuges, parks, historic sites, and military facilities.<sup>2</sup> These acres represent the land currently under the control of the Bureau of Land Management (BLM) and within national forests.

Under the Alaska Statehood Act (P.L. 85-508), the federal government granted to Alaska 28 percent of total land area within its borders, with additional land grants for schools, universities, and the Mental Health Trust. All land grants combined provided the new state the authority to select approximately 105 million acres. According to DNR, the state has received patent to about 99.5 million acres of that total amount and awaits transfer of the remaining 5.5 million acres.<sup>3</sup>

Should the BLM and national forest land referenced above become available, the question of how Native land claims would impact land conveyance to the state is a complicated one. Presumably, the federal legislation that would convey the land would include provisions to clarify that question.<sup>4</sup> According to DNR and our reading of existing federal law, valid Native claims are generally given priority over those of the state. For a legal opinion on this issue, and the various other legal intricacies that are likely to be posed by further federal land transfers, we recommend you contact Legislative Legal Services.

We hope this is helpful. If you have questions or need additional information, please let us know.

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<sup>1</sup> In the interest of brevity, we answer your questions with little background or detail on the complexities of land ownership in Alaska. Historical information on the Alaska Statehood Act, the Native Claims Settlement Act, and associated legislation is available by searching our public archives at <http://w3.legis.state.ak.us/lao/research/public.cgi>.

<sup>2</sup> Personal communication from Courtney Sanborn, Special Assistant to the Commissioner II, DNR, 907-269-8431.

<sup>3</sup> "Land Ownership in Alaska," DNR Fact Sheet ([http://dnr.alaska.gov/mlw/factsht/land\\_fs/land\\_own.pdf](http://dnr.alaska.gov/mlw/factsht/land_fs/land_own.pdf)), as partially updated in personal communication with Ms. Sanborn. To put all of these figures into the broader context, the Fact Sheet indicates Alaska is comprised of approximately 375 million acres in total.

<sup>4</sup> For example, 43 USC § 1635(e) appears to indicate that future state selections of federal lands that were not available at the time of implementation of the Statehood Act are subject to "Native selection rights under the Alaska Native Claims Settlement Act."

Sec. 38.05.125. Reservation.

(a) Each contract for the sale, lease, or grant of state land, and each deed to state land, properties, or interest in state land, made under AS 38.05.045 - 38.05.120, 38.05.321, 38.05.810 - 38.05.825, AS 38.08, or AS 38.50 except as provided in AS 38.50.050 is subject to the following reservations: "The party of the first part, Alaska, hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, all oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, and which may be in or upon said land above described, or any part thereof, and the right to explore the same for such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right to enter by itself, its or their agents, attorneys, and servants upon said land, or any part or parts thereof, at any and all times for the purpose of opening, developing, drilling, and working mines or wells on these or other land and taking out and removing therefrom all such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines, and railroads, sink such shafts, drill such wells, remove such soil, and to remain on said land or any part thereof for the foregoing purposes and to occupy as much of said land as may be necessary or convenient for such purposes hereby expressly reserving to itself, its lessees, successors, and assigns, as aforesaid, generally all rights and power in, to, and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved."

(b) The provisions of (a) of this section do not apply to a quitclaim of land or a transfer of an interest in land made under AS 38.05.035(b)(9).

(c) Notwithstanding (a) of this section, the transfer of ownership and management of University of Alaska trust land from the Department of Natural Resources to the Board of Regents of the University of Alaska under ch. 22, SLA 1983 includes the mineral estate of the state in the land.

History -

(Sec. 1 art VII ch 169 SLA 1959; am Sec. 14 ch 61 SLA 1960; am Sec. 1 ch 42 SLA 1966; am Sec. 3 ch 240 SLA 1976; am Sec. 2 ch 175 SLA 1980; am Sec. 36 ch 152 SLA 1984; am Sec. 1 ch 95 SLA 1995)

Decisions -

Chapter 19, SLA 1977 held not invalid. - Chapter 19, SLA 1976, authorizing a three-way exchange of land between the state of Alaska, the United States government and a regional corporation of Alaska Natives, was not invalid on the ground that it waived the provisions of this section restricting the state's right to alienate minerals and former AS 38.95.060 authorizing exchanges of land with native corporations on the basis of equal value. *State v. Lewis*, 559 P.2d 630 (Alaska 1977), appeal dismissed and cert. denied, 432 U.S. 901, 97 S. Ct. 2943, 53 L. Ed. 2d 1073 (1976).

Staking of claims. - Staking of claims is covered by this section and the activity is subject to the requirements of AS 38.05.130. *Hayes v. A.J. Assocs.*, 960 P.2d 556 (Alaska 1998).

Surface interest conveyed to third party. - The state's mineral interest in lands on which the surface estate has been conveyed to a third party is "state land" subject to the location of state mining claims in the same manner as on lands owned entirely by the state. *Hayes v. A.J. Assocs.*, 960 P.2d 556 (Alaska 1998).

## REFERENCES IN TEXT

Act of March 8, 1922 (43 U.S.C. 270-11), referred to in subsec. (a)(2), is act Mar. 8, 1922, ch. 96, 42 Stat. 415, as amended, which enacted sections 270-11 to 270-13 of this title. Sections 270-11 and 270-13 of this title were repealed by Pub. L. 94-579, title VII, § 703(a), Oct. 21, 1976, 90 Stat. 2789. For complete classification of this Act to the Code, see Tables.

Act of May 17, 1906, as amended, referred to in subsecs. (a)(3), (4), (5), (d), (e), and (f)(1)(A), is act May 17, 1906, ch. 2469, 34 Stat. 197, as amended, which was classified to sections 270-1 to 270-3 of this title prior to its repeal by Pub. L. 92-203, § 18(a), Dec. 18, 1971, 85 Stat. 710.

The Alaska Statehood Act, referred to in subsecs. (a)(4) and (e), is Pub. L. 85-508, July 7, 1958, 72 Stat. 339, as amended, which is set out as a note preceding section 21 of Title 48, Territories and Insular Possessions. For complete classification of this Act to the Code, see Tables.

The Alaska Native Claims Settlement Act, referred to in subsecs. (a)(4), (5)(A), (e), and (f)(4)(A), (5)(C)(ii)(I), is Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§1601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of this title and Tables.

That Act, as amended, referred to in subsec. (d), is the Federal Power Act, act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to chapter 12 (§ 791a et seq.) of Title 16, Conservation. Part I of the Federal Power Act of June 10, 1920, as amended, is classified generally to subchapter I (§ 791a et seq.) of chapter 12 of Title 16. For complete classification of this Act to the Code, see section 791a of Title 16 and Tables.

## CODIFICATION

In subsecs. (a)(1), (3)-(5), (c), and (d), "December 2, 1980" substituted for "the effective date of this Act", which probably meant the date of enactment of Pub. L. 96-487.

## AMENDMENTS

1998—Subsec. (a)(7), (8), Pub. L. 105-333 added pars. (7) and (8).

1992—Subsec. (a)(1). Pub. L. 102-415, § 2, designated existing provisions as subpar. (A), inserted "or within Fort Davis (except as provided in subparagraph (B))" after "Naval Petroleum Reserve No. 4)", and added subpar. (B).

Subsec. (f). Pub. L. 102-415, § 12, added subsec. (f).

**§ 1635. State selections and conveyances****(a) Omitted****(b) School lands settlement**

(1) In full and final settlement of any and all claims by the State of Alaska arising under the Act of March 4, 1915 (38 Stat. 1214), as confirmed and transferred in section 6(k) of the Alaska Statehood Act, the State is hereby granted seventy-five thousand acres which it shall be entitled to select until January 4, 1994, from vacant, unappropriated, and unreserved public lands. In exercising the selection rights granted herein, the State shall be deemed to have relinquished all claims to any right, title, or interest to any school lands which failed to vest under the above statutes at the time Alaska became a State (January 3, 1959), including lands unsurveyed on that date or surveyed lands which were within Federal reservations or withdrawals on that date.

(2) Except as provided herein, such selections shall be made in conformance with the provi-

sions for selections under section 6(b) of the Alaska Statehood Act. Selections made under this subsection shall be in units of whole sections as shown on the official survey plats of the Bureau of Land Management, including protraction diagrams, unless part of the section is unavailable or the land is otherwise surveyed, or unless the Secretary waives the whole section requirement.

(3) Lands selected and conveyed to the State under this subsection shall be subject to the provisions of subsections (j) and (k) of section 6 of the Alaska Statehood Act.

**(c) Prior tentative approvals**

(1) All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval; except that this subsection shall not apply to tentative approvals which, prior to December 2, 1980, have been relinquished by the State, or have been finally revoked by the United States under authority other than authority under section 11(a)(2), 12(a), or 12(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1610(a)(2), 1611(a), or 1611(b)].

(2) Upon approval of a land survey by the Secretary, such lands shall be patented to the State of Alaska.

(3) If the State elects to receive patent to any of the lands which are the subject of this subsection on the basis of protraction surveys in lieu of field surveys, the Secretary shall issue patent to the State on that basis within six months after notice of such election. For townships having such adverse claims of record, patent on the basis of protraction surveys shall be issued as soon as practicable after such election.

(4) Future tentative approvals of State land selections, when issued, shall have the same force and effect as those existing tentative approvals which are confirmed by this subsection and shall be processed for patent by the same administrative procedures as specified in paragraphs (2) and (3) of this subsection.

**(d) Prior State selections**

(1) In furtherance of the State's entitlement to lands under section 6(b) of the Alaska Statehood Act, the United States hereby conveys to the State of Alaska, subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], all right, title and interest of the United States in and to all vacant, unappropriated, and unreserved lands, including lands subject to subsection (1) of this section, which are specified in the list entitled "Prior State of Alaska Selections to be Conveyed by Congress", dated July 24, 1978, submitted by the State of Alaska and on file in the Office of the Secretary except those Federal lands which are specified in a list dated October 19, 1979, submitted by the State of Alaska and on file with the Office of the Secretary. If any of those townships listed above

contain lands within the boundaries of any conservation system unit, national conservation area, national recreation area, new national forest or forest addition, established, designated, or expanded by this Act, then only those lands within such townships which have been previously selected by the State of Alaska shall be conveyed pursuant to this subsection.

(2) In furtherance of the State's entitlement to lands under section 6(a) of the Alaska Statehood Act, the United States hereby conveys to the State of Alaska, subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], all right, title and interest of the United States in and to all valid land selections made from the national forests under authority of said section 6(a) which have been approved by the Secretary of Agriculture prior to July 1, 1979.

(3) As soon as practicable after December 2, 1980, the Secretary shall issue tentative approvals to such State selections as required by the Alaska Statehood Act and pursuant to subsection (i) of this section. The sequence of issuance of such tentative approvals shall be on the basis of priorities determined by the State.

(4) Upon approval of a land survey by the Secretary, such lands shall be patented to the State of Alaska.

(5) If the State elects to receive patent to any of the lands which are the subject of this subsection on the basis of protraction surveys in lieu of field surveys, the Secretary shall issue patent to the State on that basis within six months after notice of such election for townships having no adverse claims on the public land records. For townships having such adverse claims of record, patent on the basis of protraction surveys shall be issued as soon as practicable after such election.

(6) Future valid State land selections shall be subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

**(e) Future "top filings"**

Subject to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], the State, at its option, may file future selection applications and amendments thereto, pursuant to section 6(a) or (b) of the Alaska Statehood Act or subsection (b) of this section, for lands which are not, on the date of filing of such applications, available within the meaning of section 6(a) or (b) of the Alaska Statehood Act, other than lands within any conservation system unit or the National Petroleum Reserve—Alaska. Each such selection application, if otherwise valid, shall become an effective selection without further action by the State upon the date the lands included in such application become available within the meaning of subsection (a) or (b) of section 6 regardless of whether such date occurs before or after expiration of the State's land selection rights. Selection applications heretofore filed by the State may be refiled so as to become subject to the provisions of this subsection; except that no such refiled shall prejudice any claim of validity which may

be asserted regarding the original filing of such application. Nothing contained in this subsection shall be construed to prevent the United States from transferring a Federal reservation or appropriation from one Federal agency to another Federal agency for the use and benefit of the Federal Government.

**(f) Right to overselect**

(1) The State of Alaska may select lands exceeding by not more than 25 per centum in total area the amount of State entitlement which has not been patented or tentatively approved under each grant or confirmation of lands to the State contained in the Alaska Statehood Act or other law. If its selections under a particular grant exceed such remaining entitlement, the State shall thereupon list all selections for that grant which have not been tentatively approved in desired priority order of conveyance, in blocks no larger than one township in size; except that the State may alter such priorities prior to receipt of tentative approval. Upon receipt by the State of subsequent tentative approvals, such excess selections shall be reduced by the Secretary pro rata by rejecting the lowest prioritized selection blocks necessary to maintain a maximum excess selection of 25 per centum of the entitlement which has not yet been tentatively approved or patented to the State under each grant.

(2) The State of Alaska may, by written notification to the Secretary, relinquish any selections of land filed under the Alaska Statehood Act or subsection (b) of this section prior to receipt by the State of tentative approval, except that lands conveyed pursuant to subsection (g) of this section may not be relinquished pursuant to this paragraph.

(3) Omitted

**(g) Conveyance of specified lands**

In furtherance of the State's entitlement to lands under section 6(b) of the Alaska Statehood Act, the United States hereby conveys to the State of Alaska all right, title, and interest of the United States in and to all vacant, unappropriated, and unreserved lands, including lands subject to subsection (e) of this section but which lie within those townships outside the boundaries of conservation system units, National Conservation Areas, National Recreation Areas, new national forests and forest additions, established, designated, or expanded by this Act, which are specified in the list entitled "State Selection Lands May 15, 1978", dated July 24, 1978, submitted by the State of Alaska and on file in the office of the Secretary of the Interior. The denomination of lands in such list which are not, on December 2, 1980, available lands within the meaning of section 6(b) of the Alaska Statehood Act and this Act shall be treated as a future selection application pursuant to subsection (e) of this section, to the extent such an application could have been filed under such subsection (e) of this section.

**(h) Limitation of conveyances of specified lands tentative approvals; surveys**

(1) Lands identified in subsection (g) of this section are conveyed to the State subject to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act

[43 U.S.C. 1601 et seq.]. All right, title, and interest of the United States in and to such lands shall vest in the State of Alaska as of December 2, 1980, subject to those reservations specified in subsection (l) of this section.

(2)(A) As soon as practicable after December 2, 1980, the Secretary shall issue to the State tentative approvals to such lands as required by the Alaska Statehood Act and pursuant to subsection (i) of this section.

(B)(i) The sequence of issuance of such tentative approvals shall be on the basis of priorities determined by the State.

(ii) In establishing the priorities for tentative approval under clause (i), the State shall—

(I) in the case of a selection under section 6(a) of Public Law 85-508 (commonly known as the "Alaska Statehood Act") (72 Stat. 340), include all land selected; or

(II) in the case of a selection under section 6(b) of that Act—

(aa) include at least 5,760 acres; or

(bb) if a waiver has been granted under section 6(g) of that Act or less than 5,760 acres of the entitlement remains, prioritize the selection in such increments as are available for conveyance.

(3) Upon approval of a land survey by the Secretary, those lands identified in subsection (g) of this section shall be patented to the State of Alaska.

(4) If the State elects to receive patent to any of the lands which are identified in subsection (g) of this section on the basis of protraction surveys in lieu of field surveys, the Secretary shall issue patent to the State on that basis within six months after notice of such election for townships having no adverse claims on the public land records. For townships having such adverse claims of record, patent on the basis of protraction surveys shall be issued as soon as practicable after such election.

#### (i) Adjudication

Nothing contained in this section shall relieve the Secretary of the duty to adjudicate conflicting claims regarding the lands specified in subsection (g) of this section, or otherwise selected under authority of the Alaska Statehood Act, subsection (b) of this section, or other law, prior to the issuance of tentative approval.

#### (j) Clarification of land status outside units

As to lands outside the boundaries of a conservation system unit, National Recreation Areas, National Conservation Areas, new national forests and forest additions, the following withdrawals, classifications, or designations shall not, of themselves, remove the lands involved from the status of vacant, unappropriated, and unreserved lands for the purposes of subsection (d) or (g) of this section and future State selections pursuant to the Alaska Statehood Act or subsection (b) of this section:

(1) withdrawals for classification pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. 1616(d)(1)]; except that, in accordance with the Memorandum of Understanding between the United States and the State of Alaska dated September 2, 1972, to the extent that Public Land Orders Numbered

5150, 5151, 5181, 5182, 5184, 5187, 5190, 5194, and 5388 by their terms continue to prohibit State selections of certain lands, such lands shall remain unavailable for future State selection except as provided by subsection (e) of this Act;<sup>1</sup>

(2) withdrawals pursuant to section 11 of the Alaska Native Claims Settlement Act [43 U.S.C. 1610], which are not finally conveyed pursuant to section 12, 14, or 19 of such Act [43 U.S.C. 1611, 1613, or 1618];

(3) classifications pursuant to the Classification and Multiple Use Act (78 Stat. 987);

(4) classifications or designations pursuant to the National Forest Management Act (90 Stat. 2949) as amended; and

(5) classifications, withdrawals exceeding 5,000 acres (except withdrawals exceeding 5,000 acres which the Congress, by concurrent resolution, approves within 180 days of the withdrawal or December 2, 1980, whichever occurs later), or designations pursuant to the Federal Land Policy and Management Act (90 Stat. 2743) [43 U.S.C. 1701 et seq.].

#### (k) Interim provisions

Notwithstanding any other provision of law, on lands selected by, or granted or conveyed to, the State of Alaska under section 6 of the Alaska Statehood Act or this Act, but not yet tentatively approved to the State:

(1) The Secretary is authorized to make contracts and grant leases, licenses, permits, rights-of-way, or easements, and any tentative approval or patent shall be subject to such contract, lease, license, permit, right-of-way, or easement; except that (A) the authority granted the Secretary by this subsection is that authority the Secretary otherwise would have had under existing laws and regulations had the lands not been selected by the State, and (B) the State has concurred prior to such action by the Secretary.

(2) On and after December 2, 1980, 90 per centum of any and all proceeds derived from contracts, leases, licenses, permits, rights-of-way, or easements or from trespasses originating after the date of selection by the State shall be held by the Secretary until such lands have been tentatively approved to the State. As such lands are tentatively approved, the Secretary shall pay to the State from such account the proceeds allocable to such lands which are derived from contracts, leases, licenses, permits, rights-of-way, easements, or trespasses. The proceeds derived from contracts, leases, licenses, permits, rights-of-way, easements or trespasses and deposited to the account pertaining to lands selected by the State but not tentatively approved due to rejection or relinquishment shall be paid as would have been required by law were it not for the provisions of this Act. In the event that the tentative approval does not cover all of the land embraced within any contract, lease, license, permit, right-of-way, easement, or trespass, the State shall only be entitled to the proportionate amount of the proceeds derived from such contract, lease, license, per-

<sup>1</sup>So in original. Probably should be "subsection (e) of this section;"

mit, right-of-way, or easement, which results from multiplying the total of such proceeds by a fraction in which the numerator is the acreage of such contract, lease, license, permit, right-of-way, or easement which is included in the tentative approval and the denominator is the total acreage contained in such contract, lease, license, permit, right-of-way, or easement; in the case of trespass, the State shall be entitled to the proportionate share of the proceeds in relation to the damages occurring on the respective lands.

(3) Nothing in this subsection shall relieve the State or the United States of any obligations under section 9 of the Alaska Native Claims Settlement Act [43 U.S.C. 1608] or the fourth sentence of section 6(h) of the Alaska Statehood Act.

**(l) Existing rights**

(1) All conveyances to the State under section 6 of the Alaska Statehood Act, this Act, or any other law, shall be subject to valid existing rights, to Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], and to any right-of-way or easement reserved for or appropriated by the United States prior to selection of the underlying lands by the State of Alaska.

(2) Where, prior to a conveyance to the State, a right-of-way or easement has been reserved for or appropriated by the United States or a contract, lease, permit, right-of-way, or easement has been issued for the lands, the conveyance shall contain provisions making it subject to the right-of-way or easement reserved or appropriated and to the contract, lease, license, permit, right-of-way, or easement issued or granted, and also subject to the right of the United States, contractee, lessee, licensee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits previously granted, issued, reserved, or appropriated. Upon issuance of tentative approval, the State shall succeed and become entitled to any and all interests of the United States as contractor, lessor, licensor, permittor,<sup>2</sup> or grantor, in any such contracts, leases, licenses, permits, rights-of-way, or easements, except those reserved to the United States in the tentative approval.

(3) The administration of rights-of-way or easements reserved to the United States in the tentative approval shall be in the United States, including the right to grant an interest in such right-of-way or easement in whole or in part.

(4) Where the lands tentatively approved do not include all of the land involved with any contract, lease, license, permit, right-of-way, or easement issued or granted, the administration of such contract, lease, license, permit, right-of-way, or easement shall remain in the United States unless the agency responsible for administration waives such administration.

(5) Nothing in this subsection shall relieve the State or the United States of any obligations under section 9 of the Alaska Native Claims Settlement Act [43 U.S.C. 1608] or the fourth sentence of section 6(h) of the Alaska Statehood Act.

**(m) Extinction of certain time extensions**

Any extensions of time periods granted to the State pursuant to section 17(d)(2)(E) of the Alaska Native Claims Settlement Act [43 U.S.C. 1616(d)(2)(E)] are hereby extinguished, and the time periods specified in subsections (a) and (b) of this section shall hereafter be applicable to State selections.

**(n) Effect on third-party rights**

(1) Nothing in this section shall alter the rights or obligations of any party with regard to section 12 of the Act of January 2, 1976 (Public Law 94-204), sections 4 and 5 of the Act of October 4, 1976 (Public Law 94-456), or section 3 of the Act of November 15, 1977 (Public Law 94-178).

(2) Any conveyance of land to or confirmation of prior selections of the State made by this Act or selections allowed under this Act shall be subject to the rights of Cook Inlet Region, Incorporated, to nominate lands outside of its region with such nominations to be superior to any selection made by the State after July 18, 1975, including any lands conveyed to the State pursuant to subsection (g) of this section, and to the duty of the Secretary, with consent of the State, to make certain lands within the Cook Inlet Region available to the Corporation, both in accordance with the provisions of section 12(b) of the Act of January 2, 1976 (Public Law 94-204), as amended.

(3) Nothing in this chapter shall prejudice a claim of validity or invalidity regarding any third-party interest created by the State of Alaska prior to December 18, 1971, under authority of section 6(g) of the Alaska Statehood Act or otherwise.

(4) Nothing in this Act shall affect any right of the United States or Alaska Natives to seek and receive damages against any party for trespass against, or other interference with, aboriginal interests if any, occurring prior to December 18, 1971.

**(o) Status of lands within units**

(1) Notwithstanding any other provision of law, subject to valid existing rights any land withdrawn pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. 1616(d)(1)] and within the boundaries of any conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be added to such unit and administered accordingly unless, before, on, or after December 2, 1980, such land has been validly selected by and conveyed to a Native Corporation, or unless before December 2, 1980, such land has been validly selected by, and after December 2, 1980, is conveyed to the State. At such time as the entitlement of any Native Corporation to land under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] is satisfied, any land within a conservation system unit selected by such Native Corporation shall, to the extent that such land is in excess of its entitlement, become part of such unit and administered accordingly: *Provided*, That nothing in this subsection shall necessarily preclude the future conveyance to the State of those Federal lands which are specified in a list dated October 19, 1979, submitted by the State of Alaska and on

<sup>2</sup>So in original. Probably should be "permitter."

file with the Office of the Secretary: *Provided further*, That nothing in this subsection shall affect any conveyance to the State pursuant to subsections (b), (c), (d), or (g) of this section.

(2) Until conveyed, all Federal lands within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be administered in accordance with the laws applicable to such unit.

**(p) PYK line**

The second proviso of section 6(b) of the Alaska Statehood Act regarding Presidential approval of land selection north and west of the line described in section 10 of such Act shall not apply to any conveyance of land to the State pursuant to subsections (c), (d), and (g) of this section but shall apply to future State selections.

(Pub. L. 96-487, title IX, §906, Dec. 2, 1980, 94 Stat. 2437; Pub. L. 108-452, title I, §102, Dec. 10, 2004, 118 Stat. 3577.)

REFERENCES IN TEXT

Act of March 4, 1915, as confirmed and transferred in section 6(k) of the Alaska Statehood Act, referred to in subsec. (b)(1), is act Mar. 4, 1915, ch. 181, §1, 38 Stat. 1214, which was classified to section 353 of Title 48, Territories and Insular Possessions, and was repealed by section 6(k) of the Alaska Statehood Act, Pub. L. 85-508, §6(k), July 7, 1958, 72 Stat. 343. See section 6(k) of the Alaska Statehood Act set out as a note preceding section 21 of Title 48.

The Alaska Statehood Act, referred to in text, is Pub. L. 85-508, July 7, 1958, 72 Stat. 339, as amended, which is set out as a note preceding section 21 of Title 48. For complete classification of this Act to the Code, see Tables.

The Alaska Native Claims Settlement Act, referred to in subsections (c)(1), (d)(1), (2), (6), (e), (h)(1), (l)(1), and (o)(1), is Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§1601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of this title and Tables.

This Act, referred to in subsections (d)(1), (g), (k), (l)(1), and (n)(2), (4), is Pub. L. 96-487, Dec. 2, 1980, 94 Stat. 2371, as amended, known as the Alaska National Interest Lands Conservation Act. For complete classification of this Act to the Code, see Short Title note set out under section 3101 of Title 16, Conservation, and Tables.

The Classification and Multiple Use Act, referred to in subsec. (j)(3), probably means Pub. L. 88-607, Sept. 19, 1964, 78 Stat. 986, which enacted sections 1411 to 1418 of this title, and was omitted from the Code.

The National Forest Management Act, as amended, referred to in subsec. (j)(4), probably means the National Forest Management Act of 1976, Pub. L. 94-588, Oct. 22, 1976, 90 Stat. 2949, as amended. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 1600 of Title 16, Conservation, and Tables.

The Federal Land Policy and Management Act, referred to in subsec. (j)(5), probably means the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, Oct. 21, 1976, 90 Stat. 2743, as amended, which is classified principally to chapter 35 (§1701 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of this title and Tables.

Section 12 of the Act January 2, 1976 (Public Law 94-204), referred to in subsec. (n)(1) and (2), is section 12 of Pub. L. 94-204, Jan. 2, 1976, 89 Stat. 1150, as amended, which is set out as a note under section 1611 of this title.

Sections 4 and 5 of the Act of October 4, 1976 (Public Law 94-456), referred to in subsec. (n)(1), are sections 4 and 5 of Pub. L. 94-456, Oct. 4, 1976, 90 Stat. 1935, which are set out as a note under section 1611 of this title.

Section 3 of the Act of November 15, 1977 (Public Law 94-178), referred to in subsec. (n)(1), probably means section 3 of Pub. L. 95-178, Nov. 15, 1977, 91 Stat. 1369, which enacted a provision set out as a note under section 1611 of this title and amended a provision set out as a note under section 1611 of this title.

This chapter, referred to in subsec. (n)(3), was in the original "this title", meaning title IX of Pub. L. 96-487, Dec. 2, 1980, 94 Stat. 2430, which enacted this chapter, amended sections 1614 and 1620 of this title, and amended provisions set out as notes under section 1611 of this title and preceding section 21 of Title 48, Territories and Insular Possessions. For complete classification of title IX to the Code, see Tables.

Section 10 of the Alaska Statehood Act, referred to in subsec. (p), is section 10 of Pub. L. 85-508, July 7, 1958, 72 Stat. 339, which is set out as a note preceding section 21 of Title 48.

CODIFICATION

Section is comprised of section 906 of Pub. L. 96-487. Subsecs. (a) and (f)(3) of section 906 of Pub. L. 96-487 amended section 6(a) and (b), and section 6(g), respectively, of the Alaska Statehood Act, Pub. L. 85-508, July 7, 1958, 72 Stat. 339, which is set out as a note preceding section 21 of Title 48, Territories and Insular Possessions.

In subsec. (j)(5), "December 2, 1980" substituted for "the effective date of this Act", which probably meant the date of enactment of Pub. L. 96-487.

AMENDMENTS

2004—Subsec. (h)(2). Pub. L. 108-452 designated first sentence as subpar. (A) and second sentence as cl. (i) of subpar. (B) and added cl. (ii) of subpar. (B).

SELECTION OF CERTAIN REVERSIONARY INTERESTS HELD BY THE UNITED STATES

Pub. L. 108-452, title I, §103, Dec. 10, 2004, 118 Stat. 3577, provided that:

"(a) IN GENERAL.—All reversionary interests held by the United States in land owned by the State [of Alaska] or any political subdivision of the State and any Federal land leased by the State under the Act of August 23, 1950 (25 U.S.C. 293b), or the Act of June 4, 1953 (25 U.S.C. 293a), that is prioritized for conveyance by the State under section 906(h)(2) of the Alaska National Interest Lands Conservation Act (43 U.S.C. 1635(h)(2))—

"(1) are deemed to be selected; and

"(2) may, with the concurrence of the Secretary [of the Interior] or the head of the Federal agency with administrative jurisdiction over the land, be conveyed under section 6 of Public Law 85-508 (commonly known as the 'Alaska Statehood Act') (72 Stat. 340) [set out as a note preceding section 21 of Title 48, Territories and Insular Possessions].

"(b) EFFECT ON ENTITLEMENT.—If, before the date of enactment of this Act [Dec. 10, 2004], the entitlement of the State has not been charged with respect to a parcel for which a reversionary interest is conveyed under subsection (a), the total acreage of the parcel shall be charged against the remaining entitlement of the State.

"(c) MINIMUM ACREAGE REQUIREMENT NOT APPLICABLE.—The minimum acreage requirement under subsections (a) and (b) of section 6 of Public Law 85-508 (commonly known as the 'Alaska Statehood Act') (72 Stat. 340) shall not apply to the selection of reversionary interests under subsection (a).

"(d) STATE WAIVER.—On conveyance to the State of any reversionary interest selected under subsection (a), the State shall be deemed to have waived all right to any future credit should the reversion not occur.

"(e) LIMITATION.—This section shall not apply to—

"(1) reversionary interests in land acquired by the United States through the use of amounts from the Exxon Valdez Oil Spill Trust Fund; or

"(2) reversionary interests in any land conveyed to the State as a result of the 'Terms and Conditions for Land Consolidation and Management in Cook Inlet Area' as ratified by section 12 of Public Law 94-204 (43 U.S.C. 1611 note)."

#### SETTLEMENT OF REMAINING ENTITLEMENT

Pub. L. 108-452, title I, §106, Dec. 10, 2004, 118 Stat. 3579, provided that:

"(a) IN GENERAL.—The Secretary [of the Interior] may enter into a binding written agreement with the State [of Alaska] with respect to—

"(1) the exact number and location of acres of land remaining to be conveyed under each entitlement established or confirmed by Public Law 85-508 (commonly known as the 'Alaska Statehood Act') (72 Stat. 340) [set out as a note preceding section 21 of Title 48, Territories and Insular Possessions], from—

"(A) the land selected by the State as of January 3, 1994; and

"(B) selections under the Act of January 21, 1929 (45 Stat. 1091, chapter 92) [43 U.S.C. 852 note];

"(2) the priority in which the land is to be conveyed;

"(3) the relinquishment of selections which are not to be conveyed; and

"(4) the survey of the exterior boundaries of the land to be conveyed.

"(b) CONSULTATION.—Before entering into an agreement under subsection (a), the Secretary shall ensure that any concerns or issues identified by any Federal agency potentially affected are given consideration.

"(c) ERRORS.—The State, by entering into an agreement under subsection (a), shall receive any gain or bear any loss that results from errors in prior surveys, protraction diagrams, or the computation of the ownership of third parties on any land conveyed under an agreement entered into under subsection (a).

"(d) AVAILABILITY OF AGREEMENTS.—Agreements entered into under subsection (a) shall be available for public inspection in the appropriate offices of the Department of the Interior.

"(e) EFFECT.—Nothing in this section increases the entitlement provided to the State under Public Law 85-508 (commonly known as the 'Alaska Statehood Act') (72 Stat. 340), or the Act of January 21, 1929 (45 Stat. 1091, chapter 92)."

#### EFFECT OF FEDERAL MINING CLAIMS

Pub. L. 108-452, title I, §107, Dec. 10, 2004, 118 Stat. 3580, provided that:

"(a) CONDITIONAL RELINQUISHMENTS.—

"(1) IN GENERAL.—To facilitate the conversion of Federal mining claims to State [of Alaska] mining claims on land selected or topfiled by the State, a Federal mining claimant may file with the Secretary [of the Interior] a voluntary relinquishment of the Federal mining claim conditioned on conveyance of the land to the State.

"(2) CONVEYANCE OF RELINQUISHED CLAIM.—The Secretary may convey the land described in the relinquished Federal mining claim to the State if, with respect to the land—

"(A) the State has filed as of January 3, 1994—

"(i) a selection application under Public Law 85-508 (commonly known as the 'Alaska Statehood Act') (72 Stat. 339) [set out as a note preceding section 21 of Title 48, Territories and Insular Possessions]; or

"(ii) a future selection application under section 906(e) of the Alaska National Interest Lands Conservation Act [(43 U.S.C. 1635(e)); and

"(B) the land addressed by the selection application or future selection application is conveyed to the State.

"(3) OBLIGATIONS UNDER FEDERAL LAW.—Until the date on which the land is conveyed under paragraph (2), a Federal mining claimant shall be subject to any obligations relating to the land under Federal law.

"(4) NO RELINQUISHMENT.—If the land previously encumbered by the relinquished Federal mining claim is not conveyed to the State under paragraph (2), the relinquishment of land under paragraph (1) shall be of no effect.

"(b) RIGHTS-OF-WAY; OTHER INTEREST.—On conveyance to the State of a relinquished Federal mining claim under this section, the State shall assume authority over any leases, licenses, permits, rights-of-way, operating plans, other land use authorizations, or reclamation obligations applicable to the relinquished Federal mining claim on the date of conveyance."

#### FINAL PRIORITIZATION OF STATE SELECTIONS

Pub. L. 108-452, title IV, §404, Dec. 10, 2004, 118 Stat. 3593, provided that:

"(a) FILING OF FINAL PRIORITIES.—

"(1) IN GENERAL.—The State [of Alaska] shall, not later than the date that is 4 years after the date of enactment of this Act [Dec. 10, 2004], in accordance with section 906(f)(1) of the Alaska National Interest Lands Conservation Act (43 U.S.C. 1635(f)(1)), file final priorities with the Secretary [of the Interior] for all land grant entitlements to the State which remain unsatisfied on the date of the filing.

"(2) RANKING.—All selection applications on file with the Secretary on the date specified in paragraph (1) shall—

"(A) be ranked on a Statewide basis in order of priority; and

"(B) include an estimate of the acreage included in each selection.

"(3) INCLUSIONS.—The State shall include in the prioritized list land which has been top-filed under section 906(e) of the Alaska National Interest Lands Conservation Act (43 U.S.C. 1635(e)).

"(4) ACREAGE LIMITATION.—

"(A) IN GENERAL.—Acreage for top-filings shall not be counted against the 125 percent limitation established under section 906(f)(1) of the Alaska National Interest Lands Conservation Act (43 U.S.C. 1635(f)(1)).

"(B) RELINQUISHMENT.—

"(i) IN GENERAL.—The State shall relinquish any selections that exceed the 125 percent limitation.

"(ii) FAILURE TO RELINQUISH.—If the State fails to relinquish a selection under clause (i), the Secretary shall reject the selection.

"(5) LOWER-PRIORITY SELECTIONS.—Notwithstanding the prioritization of selection applications under paragraph (1), if the Secretary reserves sufficient entitlements for the top-filed selections, the Secretary may continue to convey lower-priority selections.

"(b) DEADLINE FOR PRIORITIZATION.—

"(1) IN GENERAL.—The State shall irrevocably prioritize sufficient selections to allow the Secretary to complete transfer of 101,000,000 acres by September 30, 2009.

"(2) REPRIORITIZATION.—Any selections remaining after September 30, 2009, may be reprioritized.

"(c) FINANCIAL ASSISTANCE.—The Secretary may, using amounts made available to carry out this Act [see Short Title of 2004 Amendment note set out under section 1601 of this title], provide financial assistance to other Federal agencies, the State, and Native Corporations and entities to assist in completing the transfer of land by September 30, 2009."

#### § 1636. Alaska land bank

##### (a) Establishment; agreements

(1) In order to enhance the quantity and quality of Alaska's renewable resources and to facilitate the coordinated management and protection of Federal, State, and Native and other private lands, there is hereby established the Alaska Land Bank Program. Any private landowner is authorized as provided in this section to enter

## Public Law 85-508

## AN ACT

To provide for the admission of the State of Alaska into the Union.

July 7, 1958  
[H. R. 7999]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Alaska, state-  
hood.

SEC. 2. The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

Territory.

SEC. 3. The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

Constitution.

SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

Compact with  
U.S.

Title to property.

SEC. 5. The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Selection from public lands.

SEC. 6. (a) For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

(b) The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: *And provided further*, That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.

(c) Block 32, and the structures and improvements thereon, in the city of Juneau are granted to the State of Alaska for any or all of the following purposes or a combination thereof: A residence for the Governor, a State museum, or park and recreational use.

(d) Block 19, and the structures and improvements thereon, and the interests of the United States in blocks C and 7, and the structures and improvements thereon, in the city of Juneau, are hereby granted to the State of Alaska.

Fish and wildlife resources.

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U. S. C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U. S. C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U. S. C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the

first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937, as amended (16 U. S. C., sec. 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U. S. C., sec. 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea-otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U. S. C., secs. 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U. S. C., sec. 772 et seq.).

55 Stat. 632.

64 Stat. 434.

(f) Five per centum of the proceeds of sale of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to said State to be used for the support of the public schools within said State.

Public school  
support.

(g) Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right of selection shall have precedence over the preferred right of application created by section 4 of the Act of September

27, 1944 (58 Stat. 748; 43 U. S. C., sec. 282), as now or hereafter amended, but not over other preference rights now conferred by law. Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested without any interior subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey; where any lands desired by the State are surveyed at the time of their selection, the boundaries of the area requested shall conform to the public land subdivisions established by the approval of the survey. All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. As used in this subsection, the words "equitable claims subject to allowance and confirmation" include, without limitation, claims of holders of permits issued by the Department of Agriculture on lands eliminated from national forests, whose permits have been terminated only because of such elimination and who own valuable improvements on such lands.

Mineral leases,  
permits, etc.

48 USC 432,  
passim.

(h) Any lease, permit, license, or contract issued under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C., sec. 181 and following), as amended, or under the Alaska Coal Leasing Act of October 20, 1914 (38 Stat. 741; 30 U. S. C., sec. 432 and following), as amended, shall have the effect of withdrawing the lands subject thereto from selection by the State of Alaska under this Act, unless such lease, permit, license, or contract is in effect on the date of approval of this Act, and unless an application to select such lands is filed with the Secretary of the Interior within a period of five years after the date of the admission of Alaska into the Union. Such selections shall be made only from lands that are otherwise open to selection under this Act, and shall include the entire area that is subject to each lease, permit, license, or contract involved in the selections. Any patent for lands so selected shall vest in the State of Alaska all right, title, and interest of the United States in and to any such lease, permit, license, or contract that remains outstanding on the effective date of the patent, including the right to all rentals, royalties, and other payments accruing after that date under such lease, permit, license, or contract, and including any authority that may have been retained by the United States to modify the terms and conditions of such lease, permit, license, or contract: *Provided*, That nothing herein contained shall affect the continued validity of any such lease, permit, license, or contract or any rights arising thereunder.

Mineral land  
grants.

(i) All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

Schools and col-  
leges.

(j) The schools and colleges provided for in this Act shall forever remain under the exclusive control of the State, or its governmental

subdivisions, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

(k) Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission. Effective upon the admission of the State of Alaska into the Union, section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U. S. C., sec. 353), as amended, and the last sentence of section 35 of the Act of February 25, 1920 (41 Stat. 450; 30 U. S. C., sec. 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon the admission of said State into the Union, be granted to said State for the purposes for which they were reserved; but such repeal shall not affect any outstanding lease, permit, license, or contract issued under said section 1, as amended, or any rights or powers with respect to such lease, permit, license, or contract, and shall not affect the disposition of the proceeds or income derived prior to such repeal from any lands reserved under said section 1, as amended, or derived thereafter from any disposition of the reserved lands or an interest therein made prior to such repeal.

(l) The grants provided for in this Act shall be in lieu of the grant of land for purposes of internal improvements made to new States by section 8 of the Act of September 4, 1841 (5 Stat. 455), and sections 2378 and 2379 of the Revised Statutes (43 U. S. C., sec. 857), and in lieu of the swampland grant made by the Act of September 28, 1850 (9 Stat. 520), and section 2479 of the Revised Statutes (43 U. S. C., sec. 982), and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress made by the Act of July 2, 1862, as amended (12 Stat. 503; 7 U. S. C., secs. 301-308), which grants are hereby declared not to extend to the State of Alaska.

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

SEC. 7. Upon enactment of this Act, it shall be the duty of the President of the United States, not later than July 3, 1958, to certify such fact to the Governor of Alaska. Thereupon the Governor, on or after July 3, 1958, and not later than August 1, 1958, shall issue his proclamation for the elections, as hereinafter provided, for officers of all elective offices and in the manner provided for by the constitution of the proposed State of Alaska, but the officers so elected shall in any event include two Senators and one Representative in Congress.

SEC. 8. (a) The proclamation of the Governor of Alaska required by section 7 shall provide for holding of a primary election and a general election on dates to be fixed by the Governor of Alaska: *Provided*, That the general election shall not be held later than December 1, 1958, and at such elections the officers required to be elected as provided in section 7 shall be, and officers for other elective offices provided for in the constitution of the proposed State of Alaska may be, chosen by the people. Such elections shall be held, and the qualifications of voters thereat shall be, as prescribed by the constitution of the proposed State of Alaska for the election of members of the proposed State legislature. The returns thereof shall be made and certified in such manner as the constitution of the proposed State of Alaska may prescribe. The Governor of Alaska shall certify the results of said elections to the President of the United States.

(b) At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special

Confirmation of grants.

Repeals.

Internal improvements.

Submerged lands. 43 U.S.C. 1301 note.

Certification by President.

Election of officers; date, etc.

election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

“(1) Shall Alaska immediately be admitted into the Union as a State?”

“(2) The boundaries of the State of Alaska shall be as prescribed in the Act of Congress approved \_\_\_\_\_ and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.”

“(3) All provisions of the Act of Congress approved \_\_\_\_\_ reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.”

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall thereupon cease to be effective.

Certification of  
voting results by  
Governor.

The Governor of Alaska is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast on said propositions shall be made by the election officers directly to the Secretary of Alaska, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

Proclamation by  
President.

(c) If the President shall find that the propositions set forth in the preceding subsection have been duly adopted by the people of Alaska, the President, upon certification of the returns of the election of the officers required to be elected as provided in section 7 of this Act, shall thereupon issue his proclamation announcing the results of said election as so ascertained. Upon the issuance of said proclamation by the President, the State of Alaska shall be deemed admitted into the Union as provided in section 1 of this Act.

Until the said State is so admitted into the Union, all of the officers of said Territory, including the Delegate in Congress from said Territory, shall continue to discharge the duties of their respective offices. Upon the issuance of said proclamation by the President of the United States and the admission of the State of Alaska into the Union, the officers elected at said election, and qualified under the provisions of the constitution and laws of said State, shall proceed to exercise all the functions pertaining to their offices in or under or by authority of the government of said State, and officers not required to be elected at said initial election shall be selected or continued in office as provided by the constitution and laws of said State. The Governor of said State shall certify the election of the Senators and Representative in the manner required by law, and the said Senators and Representative shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

Laws in effect.

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution

of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Definitions.

SEC. 9. The State of Alaska upon its admission into the Union shall be entitled to one Representative until the taking effect of the next reapportionment, and such Representative shall be in addition to the membership of the House of Representatives as now prescribed by law: *Provided*, That such temporary increase in the membership shall not operate to either increase or decrease the permanent membership of the House of Representatives as prescribed in the Act of August 8, 1911 (37 Stat. 13) nor shall such temporary increase affect the basis of apportionment established by the Act of November 15, 1941 (55 Stat. 761; 2 U. S. C., sec. 2a), for the Eighty-third Congress and each Congress thereafter.

House of Representatives, membership.

SEC. 10. (a) The President of the United States is hereby authorized to establish, by Executive order or proclamation, one or more special national defense withdrawals within the exterior boundaries of Alaska, which withdrawal or withdrawals may thereafter be terminated in whole or in part by the President.

National defense withdrawals.

(b) Special national defense withdrawals established under subsection (a) of this section shall be confined to those portions of Alaska that are situated to the north or west of the following line: Beginning at the point where the Porcupine River crosses the international boundary between Alaska and Canada; thence along a line parallel to, and five miles from, the right bank of the main channel of the Porcupine River to its confluence with the Yukon River; thence along a line parallel to, and five miles from, the right bank of the main channel of the Yukon River to its most southerly point of intersection with the meridian of longitude 160 degrees west of Greenwich; thence south to the intersection of said meridian with the Kuskokwim River; thence along a line parallel to, and five miles from the right bank of the Kuskokwim River to the mouth of said river; thence along the shoreline of Kuskokwim Bay to its intersection with the meridian of longitude 162 degrees 30 minutes west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 57 degrees 30 minutes north; thence east to the intersection of said parallel with the meridian of longitude 156 degrees west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 50 degrees north.

(c) Effective upon the issuance of such Executive order or proclamation, exclusive jurisdiction over all special national defense withdrawals established under this section is hereby reserved to the United States, which shall have sole legislative, judicial, and executive power within such withdrawals, except as provided hereinafter. The exclusive jurisdiction so established shall extend to all lands within the exterior boundaries of each such withdrawal, and shall remain in effect with respect to any particular tract or parcel of land only so long as such tract or parcel remains within the exterior boundaries of such a

Jurisdiction.

withdrawal. The laws of the State of Alaska shall not apply to areas within any special national defense withdrawal established under this section while such areas remain subject to the exclusive jurisdiction hereby authorized: *Provided, however,* That such exclusive jurisdiction shall not prevent the execution of any process, civil or criminal, of the State of Alaska, upon any person found within said withdrawals: *And provided further,* That such exclusive jurisdiction shall not prohibit the State of Alaska from enacting and enforcing all laws necessary to establish voting districts, and the qualification and procedures for voting in all elections.

(d) During the continuance in effect of any special national defense withdrawal established under this section, or until the Congress otherwise provides, such exclusive jurisdiction shall be exercised within each such withdrawal in accordance with the following provisions of law:

(1) All laws enacted by the Congress that are of general application to areas under the exclusive jurisdiction of the United States, including, but without limiting the generality of the foregoing, those provisions of title 18, United States Code, that are applicable within the special maritime and territorial jurisdiction of the United States as defined in section 7 of said title, shall apply to all areas within such withdrawals.

(2) In addition, any areas within the withdrawals that are reserved by Act of Congress or by Executive action for a particular military or civilian use of the United States shall be subject to all laws enacted by the Congress that have application to lands withdrawn for that particular use, and any other areas within the withdrawals shall be subject to all laws enacted by the Congress that are of general application to lands withdrawn for defense purposes of the United States.

(3) To the extent consistent with the laws described in paragraphs (1) and (2) of this subsection and with regulations made or other actions taken under their authority, all laws in force within such withdrawals immediately prior to the creation thereof by Executive order or proclamation shall apply within the withdrawals and, for this purpose, are adopted as laws of the United States: *Provided, however,* That the laws of the State or Territory relating to the organization or powers of municipalities or local political subdivisions, and the laws or ordinances of such municipalities or political subdivisions shall not be adopted as laws of the United States.

(4) All functions vested in the United States commissioners by the laws described in this subsection shall continue to be performed within the withdrawals by such commissioners.

(5) All functions vested in any municipal corporation, school district, or other local political subdivision by the laws described in this subsection shall continue to be performed within the withdrawals by such corporation, district, or other subdivision, and the laws of the State or the laws or ordinances of such municipalities or local political subdivision shall remain in full force and effect notwithstanding any withdrawal made under this section.

(6) All other functions vested in the government of Alaska or in any officer or agency thereof, except judicial functions over which the United States District Court for the District of Alaska is given jurisdiction by this Act or other provisions of law, shall be performed within the withdrawals by such civilian individuals or civilian agencies and in such manner as the President shall from time to time, by Executive order, direct or authorize.

(7) The United States District Court for the District of Alaska shall have original jurisdiction, without regard to the sum or value of any matter in controversy, over all civil actions arising within such withdrawals under the laws made applicable thereto by this subsection, as well as over all offenses committed within the withdrawals.

(e) Nothing contained in subsection (d) of this section shall be construed as limiting the exclusive jurisdiction established in the United States by subsection (c) of this section or the authority of the Congress to implement such exclusive jurisdiction by appropriate legislation, or as denying to persons now or hereafter residing within any portion of the areas described in subsection (b) of this section the right to vote at all elections held within the political subdivisions as prescribed by the State of Alaska where they respectively reside, or as limiting the jurisdiction conferred on the United States District Court for the District of Alaska by any other provision of law, or as continuing in effect laws relating to the Legislature of the Territory of Alaska. Nothing contained in this section shall be construed as limiting any authority otherwise vested in the Congress or the President.

SEC. 11. (a) Nothing in this Act shall affect the establishment, or the right, ownership, and authority of the United States in Mount McKinley National Park, as now or hereafter constituted; but exclusive jurisdiction, in all cases, shall be exercised by the United States for the national park, as now or hereafter constituted; saving, however, to the State of Alaska the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said park; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said park; and saving also to the persons residing now or hereafter in such area the right to vote at all elections held within the respective political subdivisions of their residence in which the park is situated.

(b) Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4, whether such lands were acquired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided*, (i) That the State of Alaska shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land; (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Alaska, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall rest and remain in the United States only so long as the particular tract or parcel of land involved is owned by the United States and used for military, naval, Air Force, or Coast Guard purposes. The provisions of this subsection shall not apply to lands within such special national defense with-

Mount McKinley  
National Park.

Military, naval,  
etc., lands.

USC prec. Title 1.

Civil and criminal  
jurisdiction.

Judicial and  
criminal provi-  
sions.

drawal or withdrawals as may be established pursuant to section 10 of this Act until such lands cease to be subject to the exclusive jurisdiction reserved to the United States by that section.

SEC. 12. Effective upon the admission of Alaska into the Union—

(a) The analysis of chapter 5 of title 28, United States Code, immediately preceding section 81 of such title, is amended by inserting immediately after and underneath item 81 of such analysis, a new item to be designated as item 81A and to read as follows:

“81A. Alaska”;

(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof a new section, to be designated as section 81A, and to read as follows:

“§ 81A. Alaska

“Alaska constitutes one judicial district.

“Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.”;

(c) Section 133 of title 28, United States Code, is amended by inserting in the table of districts and judges in such section immediately above the item: “Arizona \* \* \* 2”, a new item as follows: “Alaska \* \* \* 1”;

(d) The first paragraph of section 373 of title 28, United States Code, as heretofore amended, is further amended by striking out the words: “the District Court for the Territory of Alaska,”: *Provided*, That the amendment made by this subsection shall not affect the rights of any judge who may have retired before it takes effect;

(e) The words “the District Court for the Territory of Alaska,” are stricken out wherever they appear in sections 333, 460, 610, 753, 1252, 1291, 1292, and 1346 of title 28, United States Code;

(f) The first paragraph of section 1252 of title 28, United States Code, is further amended by striking out the word “Alaska,” from the clause relating to courts of record;

(g) Subsection (2) of section 1294 of title 28, United States Code, is repealed and the later subsections of such section are renumbered accordingly;

(h) Subsection (a) of section 2410 of title 28, United States Code, is amended by striking out the words: “including the District Court for the Territory of Alaska,”;

(i) Section 3241 of title 18, United States Code, is amended by striking out the words: “District Court for the Territory of Alaska, the”;

(j) Subsection (e) of section 3401 of title 18, United States Code, is amended by striking out the words: “for Alaska or”;

(k) Section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: “the Territory of Alaska,”;

(l) Section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: “the Territory of Alaska,”;

(m) Section 2072 of title 28, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: “and of the District Court for the Territory of Alaska”;

(n) Subsection (q) of section 376 of title 28, United States Code, is amended by striking out the words: “the District Court for the Territory of Alaska,”: *Provided*, That the amendment made by this subsection shall not affect the rights under such section 376 of any present or former judge of the District Court for the Territory of Alaska or his survivors;

(o) The last paragraph of section 1963 of title 28, United States Code, is repealed;

(p) Section 2201 of title 28, United States Code, is amended by striking out the words: "and the District Court for the Territory of Alaska"; and

(q) Section 4 of the Act of July 28, 1950 (64 Stat. 380; 5 U. S. C., sec. 341b) is amended by striking out the word: "Alaska."

SEC. 13. No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

Continuation of suits.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska.

SEC. 14. All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed. All cases in which final judgment has been rendered in such district court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require: *Provided*, That the time allowed by existing law for appeals from the district court for said Territory shall not be enlarged thereby.

Appeals.

SEC. 15. All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in

Transfer of cases.

the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts.

Succession of  
courts.

SEC. 16. Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court.

SEC. 17. All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals to the appellate courts created by said State, and also with the same right to prosecute appeals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States.

Jurisdiction of  
District Court.  
Termination  
date.

SEC. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

Federal Reserve  
System.

SEC. 19. The first paragraph of section 2 of the Federal Reserve Act (38 Stat. 251) is amended by striking out the last sentence thereof and inserting in lieu of such sentence the following: "When the State of Alaska is hereafter admitted to the Union the Federal Reserve districts shall be readjusted by the Board of Governors of the Federal Reserve System in such manner as to include such State. Every national bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located, become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this Act and shall thereupon be an insured bank under the Federal Deposit Insurance Act, and failure to do so shall subject such bank to the penalty provided by the sixth paragraph of this section."

48 Stat. 168.  
64 Stat. 873.  
12 USC 1811  
note.

SEC. 20. Section 2 of the Act of October 20, 1914 (38 Stat. 742; 48 U. S. C., sec. 433), is hereby repealed. Repeal.

SEC. 21. Nothing contained in this Act shall operate to confer United States nationality, nor to terminate nationality heretofore lawfully acquired, nor restore nationality heretofore lost under any law of the United States or under any treaty to which the United States may have been a party. Immigration and nationality.

SEC. 22. Section 101 (a) (36) of the Immigration and Nationality Act (66 Stat. 170, 8 U. S. C., sec. 1101 (a) (36)) is amended by deleting the word "Alaska,".

SEC. 23. The first sentence of section 212 (d) (7) of the Immigration and Nationality Act (66 Stat. 188, 8 U. S. C., sec. 1182 (d) (7)) is amended by deleting the word "Alaska,".

SEC. 24. Nothing contained in this Act shall be held to repeal, amend, or modify the provisions of section 304 of the Immigration and Nationality Act (66 Stat. 237, 8 U. S. C., sec. 1404).

SEC. 25. The first sentence of section 310 (a) of the Immigration and Nationality Act (66 Stat. 239, 8 U. S. C., sec. 1421 (a)) is amended by deleting the words "District Courts of the United States for the Territories of Hawaii and Alaska" and substituting therefor the words "District Court of the United States for the Territory of Hawaii".

SEC. 26. Section 344 (d) of the Immigration and Nationality Act (66 Stat. 265, 8 U. S. C., sec. 1455 (d)) is amended by deleting the words "in Alaska and".

SEC. 27. (a) The third proviso in section 27 of the Merchant Marine Act, 1920, as amended (46 U. S. C., sec. 883), is further amended by striking out the word "excluding" and inserting in lieu thereof the word "including". Transportation by water.  
41 Stat. 999.

(b) Nothing contained in this or any other Act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Alaska and other ports in the United States, its Territories or possessions, or as conferring upon the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

SEC. 28. (a) The last sentence of section 9 of the Act entitled "An Act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes", approved October 20, 1914 (48 U. S. C. 439), is hereby amended to read as follows: "All net profits from operation of Government mines, and all bonuses, royalties, and rentals under leases as herein provided and all other payments received under this Act shall be distributed as follows as soon as practicable after December 31 and June 30 of each year: (1) 90 per centum thereof shall be paid by the Secretary of the Treasury to the State of Alaska for disposition by the legislature thereof; and (2) 10 per centum shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts." Mines and mining.  
38 Stat. 744.

(b) Section 35 of the Act entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain", approved February 25, 1920, as amended (30 U. S. C. 191), is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: "and of those from Alaska 52½ per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof". 41 Stat. 450.

Separability  
clause.

SEC. 29. If any provision of this Act, or any section, subsection, sentence, clause, phrase, or individual word, or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase, or individual word to other persons and circumstances shall not be affected thereby.

Repeals.

SEC. 30. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed.

Approved July 7, 1958.

Public Law 85-509

AN ACT

July 11, 1958  
[S. 2007]

To amend the United States Grain Standards Act, 1916, as amended, to permit the Secretary of Agriculture to charge and collect for certain services performed, and for other purposes.

United States  
Grain Standards  
Act, amendment.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 6 of the United States Grain Standards Act (39 Stat. 484; 7 U. S. C. 78) is hereby amended to read as follows:

"SEC. 6. Whenever standards shall have been fixed and established under this Act for any grain and any quantity of such grain sold, offered for sale, or consigned for sale, or which has been shipped, or delivered for shipment in interstate or foreign commerce shall have been inspected and a dispute arises as to whether the grade as determined by such inspection of any such grain in fact conforms to the standard of the specified grade, any interested party may, either with or without reinspection, appeal the question to the Secretary of Agriculture, and the Secretary of Agriculture is authorized to cause such investigation to be made and such tests to be applied as he may deem necessary and to determine the true grade: *Provided,* That any appeal from such inspection and grading to the Secretary of Agriculture shall be taken before the grain leaves the place where the inspection appealed from was made and before the identity of the grain has been lost, under such rules and regulations as the Secretary of Agriculture shall prescribe. Whenever an appeal shall be taken or a dispute referred to the Secretary of Agriculture under this Act, he shall charge and assess, and cause to be collected, a reasonable fee, in amount to be fixed by him. The fee, in case of an appeal, shall be refunded if the appeal is sustained. All such fees, not so refunded, shall be deposited and covered into the Treasury as miscellaneous receipts. The Secretary of Agriculture is authorized to pay employees assigned to perform appeal inspections for all overtime, night, or holiday work at such rates as he may determine and to accept from persons, Government agencies and departments, and Government corporations for whom such work is performed reimbursement for any sums paid for such work. The findings of the Secretary of Agriculture as to grade, signed by him or by such officer or officers, agent or agents, of the Department of Agriculture as he may designate, made after the parties in interest have had opportunity to be heard, shall be accepted in the courts of the United States as prima facie evidence of the true grade of the grain determined by him at the time and place specified in the findings."

Approved July 11, 1958.

Alaska State Land  
History and Federal Land Issues  
for Citizens Advisory Commission on Federal Areas  
August 2013

Dick Mylius  
Retired from  
Alaska Department of Natural Resources

# Presentation Objective

- To provide Historical Background regarding federal, state and Native lands for the Summit
- To provide information on land entitlements and land status
- To advance a few recommendations for consideration

# Alaska's Relationship to the Federal Government on Land Issues is Unique

- Amount of Federal Land
  - Most acreage of federal land of any state
  - 60% of state - only Nevada (88%); Utah (68%); Idaho (65%) have higher percentage
  - Large percentage in Conservation Systems
  - ANILCA created rules unique to Alaska
- ANCSA created unique relationship between federal and Native land interests
  - vibrant Native communities and culture
  - not reservations, not "Trust" lands

## Relationship is Unique ...

- Huge Acreage of State Land
  - Created huge, unique land transfer obligations
  - more state land than all other states combined
  - Other Western states only received “Trust” lands and were mostly “in place”
  - Alaska was allowed to select which federal lands it wanted, with limitations
  - Alaska had 25 + 10 years to exercise its selection rights
  - Alaska deals with Federal agencies as

# Presentation Outline

- State Land History
  - Native use and occupancy
  - Russian ownership
  - Federal ownership
  - Statehood (including navigable waters)
  - Alaska Native Claims Settlement Act
  - Alaska National Interest Lands Conservation Act

# Current Land Ownership

- State Land - 100 million acres
- Native Corporation Land - 46 million acres
- National Parks and Refuges - 124 million acres
- National Forest – 22 million acres
- US Bureau of Land Management – 73 million acres
- Municipal and Private – 5 million acres

# Federal Lands

National Parks – 54 million acres

National Wildlife Refuges – 77 million acres

National Forests – 22 million acres

BLM – National Petroleum Reserve – 23 million acres

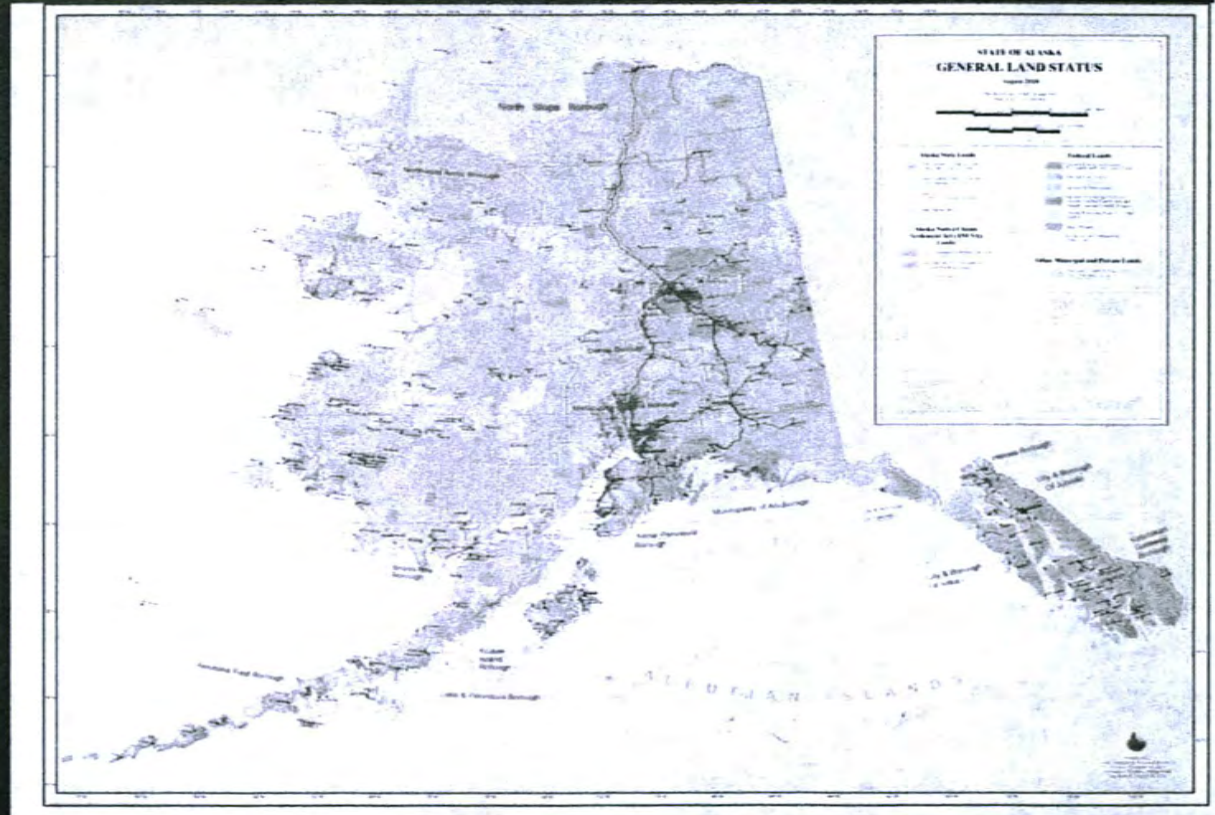
BLM other – 51 million acres

Military – 2 million acres

TOTAL FEDERAL LANDS -

242 million acres

60% of Alaska



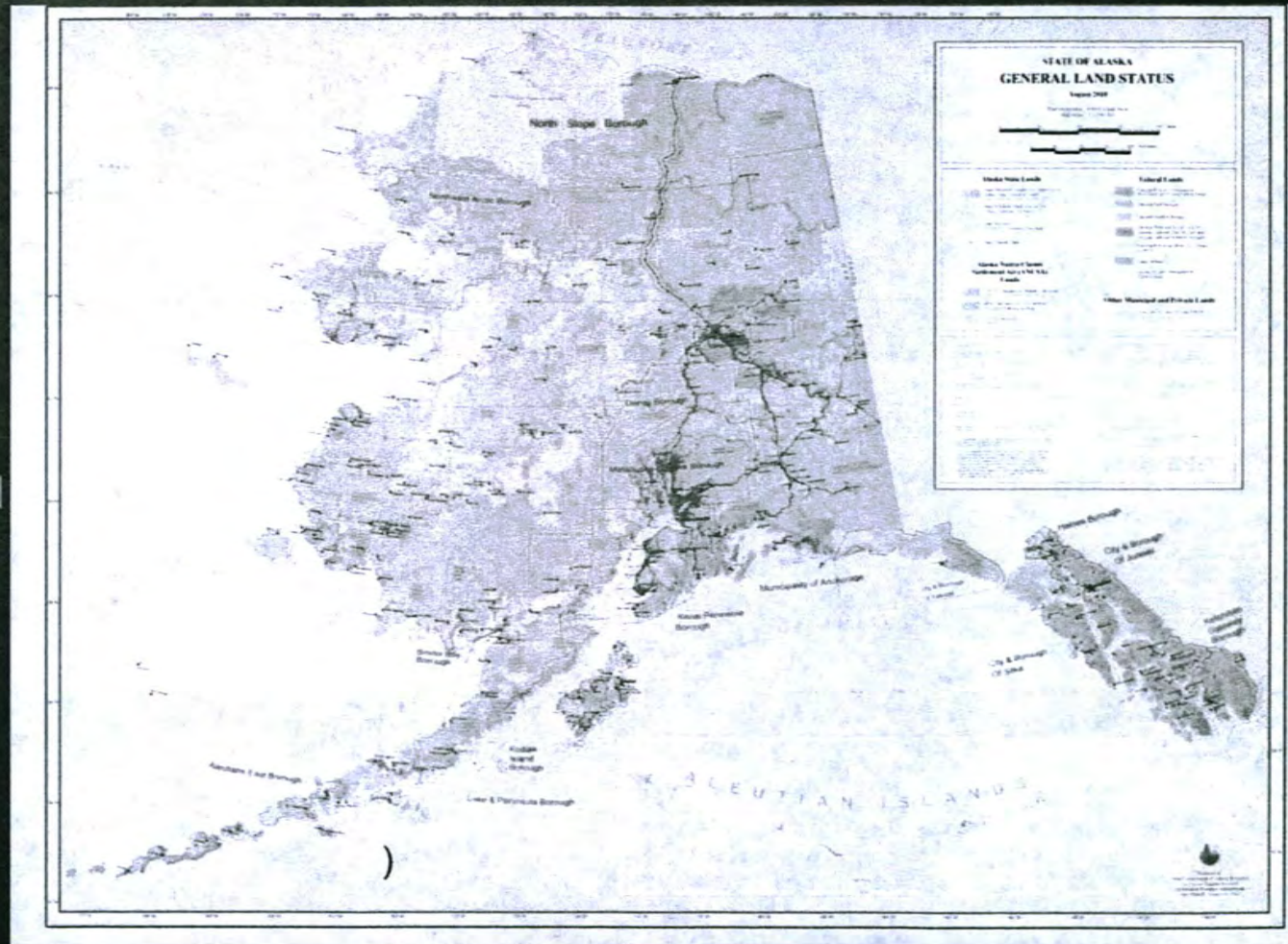
Other Federal lands shown in tan (NPRA), light yellow (other BLM lands) or gray (military lands)

# State, Municipal, ANCSA, private lands

State Land – (blue)  
105 million acres  
(28% of Alaska)

Native Corporation Land  
– (pink) 46 million acres  
(11% of Alaska)

Private or municipal  
land – (grey) 5 million  
acres  
(1% of Alaska)



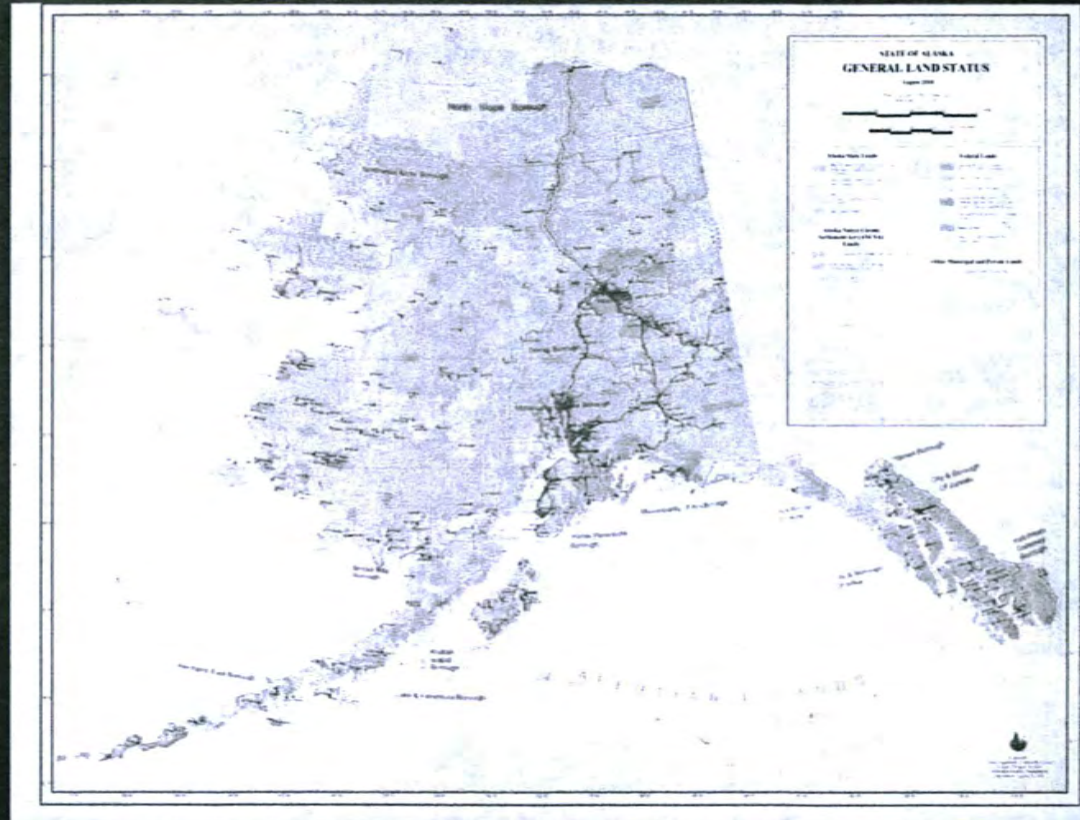
# State, Municipal, ANCSA, private lands - example

State Land – Chugach  
State Park, Mount  
Alyeska, Prudhoe Bay

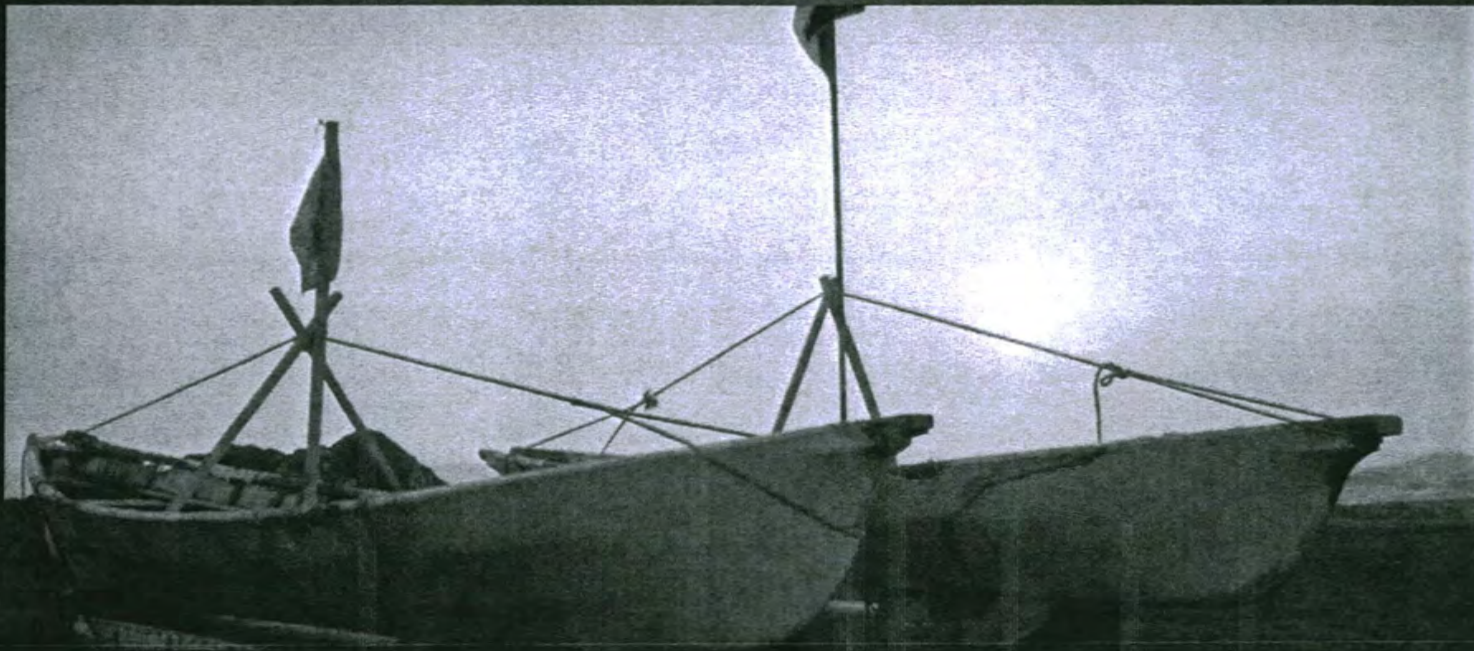
Native Corporation Land  
– Eklutna Village, Cook  
Inlet Region

Municipal – school sites,  
Kincaid Park

Private – homes and  
businesses



Pre 1867 – Native  
Alaskans used and  
“owned” most land.

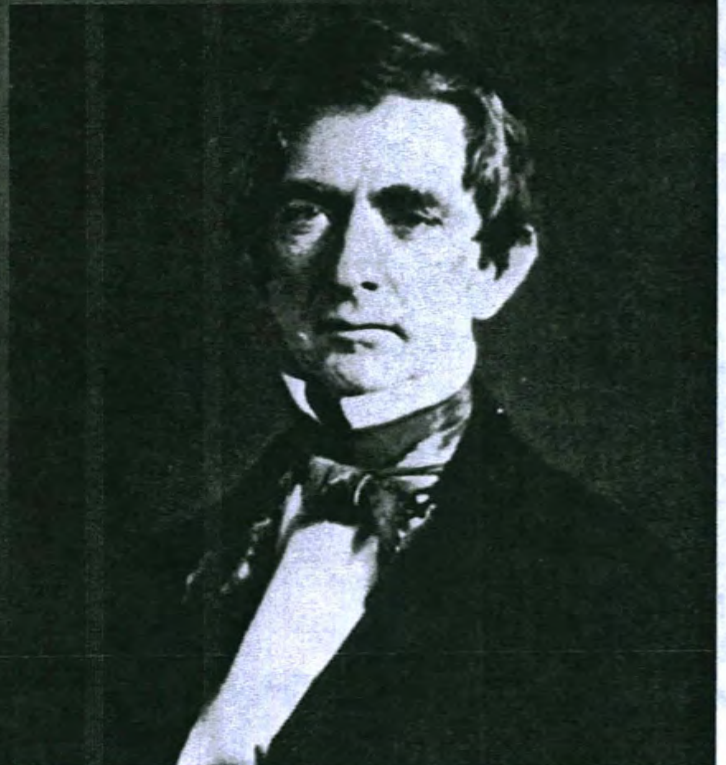


Russian occupation – 1700s to 1867 - Russia established several forts for trade, but settlement and land claims were limited to a few areas (Sitka, Kodiak)

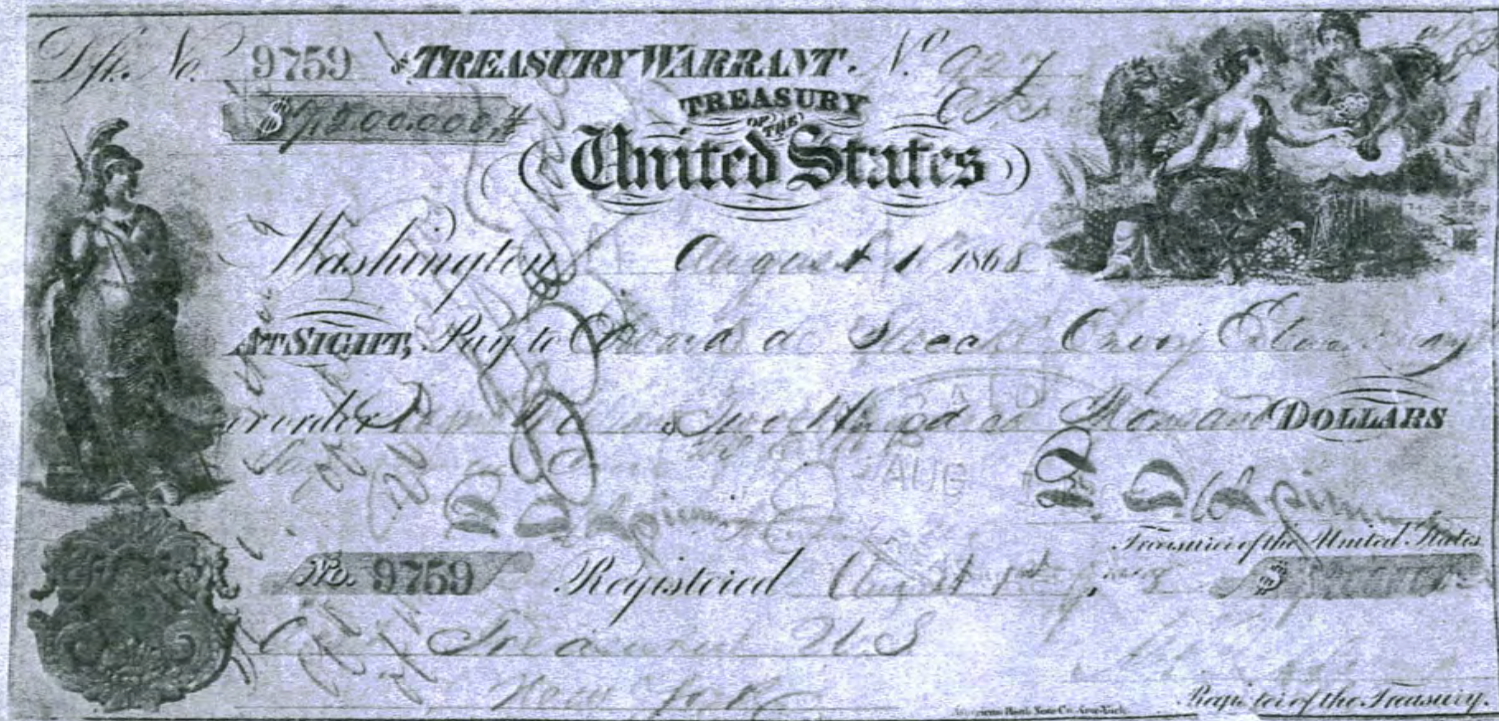


# 1867 – Treaty of Cession

- United States purchased the Alaska Territory from Russia
- Negotiated by Secretary of State William H. Seward
- All of Alaska is federal land



\$7.2 Million – less than 2c/acre



# Major Territorial Land Events

- 1870 gold discovered at Seward (SE Alaska)
- 1880s – gold discovered at Juneau, Fortymile
- 1884 – Congress extended federal mining law to Alaska, the first federal land law in Alaska, recognized Native possession of lands
- 1897-98 – Klondike Gold Rush
- 1899 -1900 – Nome Gold Rush
- 1900 - Kennecott Copper discovered
- 1903 – Alaska open to Federal Homesteading
- 1906 – Alaska Native Allotment Act

# Pre-statehood Federal Land Withdrawals

- Chugach and Tongass National Forests (1907)
- Mt McKinley National Park (1917)
- Katmai (1918) and Glacier Bay (1925) Monuments
- Naval Petroleum Reserve #4 (NPRA - 1923)
- National Wildlife Refuges: Kenai (Moose Range), Kodiak, Arctic, Aleutian Islands
- Indian Reservations:
  - St Lawrence Island, Tetlin, Elim, Arctic Village – Venetie
  - Unalakleet, Tyonek, others
  - Annette Island (Metlakatla)

# Federal Land Grants to States

- Land Ordinance of 1785
- Established Public Land Survey System (township and ranges)
- New states get Section 16 for public schools (first was Ohio – 1806)
- 1853 – California rec'd 2 sections
- 1894 – SW states rec'd 4 sections
- Grants also given for prisons, public buildings, etc.
- These are all trust lands

# Alaska Territorial Land Grants

- School Trust – 104,000 acres
- University – 111,000 acres
- Mental Health – 1 million acres
- These are all trust lands

# Alaska Statehood Debate

- Major federal spending during WW II
- Most public services were provided by the federal government
- Congress concerned about how the state would support itself
- Statehood advocates argued for a large federal land grant – for development and to fund state services

# 1959 - Alaska Statehood Act

**EXTRA** Anchorage Daily Times **EXTRA**  
READ BY ALASKANS EVERYWHERE  
FORTY-THIRD YEAR FROM 1916 ANCHORAGE, ALASKA, MONDAY, JUNE 23, 1959 12 PAGES PRICE 10 CENTS

# WE'RE IN

\*\*\*\*\*

## 64-20 VOTE MAKES ALASKA 49th STATE

### Victory Brings Quick Reactions

Leaders of the Anchorage community could hardly contain their excitement today as the news came from Washington, D.C. that the Senate had passed the statehood bill.

Senators sought the advantage of publicity of the act before it goes to the House.

The news that Alaska had become the 49th state drew spontaneous reactions from the Editor Lane of the Anchorage Daily Times.

John E. Mulvaney Jr., who had just returned from the Senate, estimated the vote, 64-20, with the margin, 44-10.

State House members, however, should be ready to consider the bill and bring it up for a vote.

In the meantime, Alaska's representatives in the House, including the late Senator Mulvaney, are expected to be in Anchorage by Tuesday.

\*\*\*\*\*

### She Goes Up Tonight

The proposed new state flag of Alaska, the one that will be used by the new state, is being made ready for the ceremony to be held tonight.

City Manager George Hansen said, "We hope to have the flag ready for the ceremony to be held tonight."

Richard Kinnard, assistant of the Governor of California, said, "We hope to see the flag in the state of Alaska."

\*\*\*\*\*

### Historic Vote Ends 6 Days Of Debate

WASHINGTON (AP) — Alaskan statehood forces won their most historic congressional battle tonight by pushing the statehood bill through the Senate in a whirlwind finish. Opposition forces utterly collapsed tonight after six days of debate.

The historic moment came at 8 o'clock EDT. (2 p.m. Anchorage time). The vote was 61-20. Victory came on the vote of 33 Republicans and 28 Democrats. Opposing it were 12 Democrats and 8 Republicans.

Fighting off all amendments and efforts to delay the bill by a committee for further study, Senator Jackson led statehood backers to the victory they have waited many years to achieve. At the same time, however, the long debate was Alaska's Delegate Bob Bartlett.

The bill now goes to the White House for the signature of President Eisenhower marked in the time of the



SALE

# Alaska Statehood Act

- 1959 – Alaska became the 49<sup>th</sup> state and received a 103,350,000 acre land grant in Statehood Act
- Section 6(a) Community Grant: 400,000 acres from both National Forests and BLM
- Section 6(b) General Grant – 102,500,000
- Section 6(m) Submerged Lands Act applied to Alaska
- Section 4 – acknowledges Native land rights

# State owned shorelands, tidelands and submerged lands – 60-65 million acres

- Shorelands – land under inland navigable waters – e.g. Yukon, Tanana, Gulkana
  - Acquired under equal footing doctrine
  - Includes land within federal Conservation System Units established after statehood
- Tidelands – lands under tidal influence
  - Acquired under submerged lands act/ equal footing doctrine

# State owned shorelands, tidelands and submerged lands

- Submerged lands – lands out to three mile territorial limit
  - Acquired under submerged lands act
- EXCEPTION – lands withdrawn at statehood – resolved by Supreme Court
  - Utah Lake
  - ANWR, NPRA (Dinkum Sands)
  - Glacier Bay

# What are the State Owned Navigable Waters ?

State acquired title in 1959, BUT –

- There is no list
- There is disagreement about what is navigable
- Pre-statehood withdrawals may have defeated state title
- There is disagreement about the impact of pre-statehood withdrawals

# How do we determine what are the navigable waters ?

- Federal courts have established criteria
- State asserts ownership and manages waterways it feels meet criteria
- Finality may require Quiet Title through federal court
- State and BLM have used Recordable Disclaimer of Interest

# Impact of Pre-Statehood Withdrawals on Ownership of Navigable Waters

Withdrawal must show intent to defeat a future state's title and specifically include waters (Utah v United States, 1987 – aka Utah Lake)

## Pre-statehood withdrawal determinations:

- Defeated State Title: NPRA, ANWR, Glacier Bay, Kenai Moose Range
- State Received Title: Tongass National Forest marine waters, Chugach NF rivers
- Currently in dispute: Stikine River

# Alaska – state owned land

165 million total acres

- 105 million acres of uplands
- 60 million acres of tidelands, shorelands and submerged lands
- Equal in area to California, Oregon and Washington combined
- Alaska is second largest landowner in US

# State Constitution – Article VIII

- Encourage settlement of its land and development of its resources by making them available for maximum use consistent with the public interest
- Provide for the utilization, development, and conservation of all natural resources belonging to the State, including lands and waters, for the maximum benefit of its people.
- Fish, wildlife and waters available for common use

# State Constitution – Article VIII

- Manage renewable resources for sustained yield
- Legislature can establish special sites and areas (parks, refuges, etc.)
- State must give public notice of and safeguard public interest in any disposal (sale, lease, etc.)
- Mineral rights by discovery and appropriation (claims), but only for minerals
- Public access to navigable waters assured

# State Land Selection History

- 1960' s – State selected slowly at first
- Initial selections were surveyed lands near population centers – Kenai, Mat-Su, Fairbanks, SE Communities
- Selections at Prudhoe Bay inspired by oil seeps, advocated by DGGS.

# Alaska Native Claims Settlement Act

1971 – Congress passed the Alaska Native Claims Settlement Act (ANSCA). ANSCA established 224 village corporations, 12 regional corporations in Alaska, one regional corporation for Alaska Natives living out of state.

# Alaska Native Claims Settlement Act

- Provide land near Native Villages – lands used for hunting, fishing, etc.
- Provide economic opportunities for Natives
- Native ownership of the lands – not trust lands, private lands
- Monetary compensation for additional lands and money to help corporations get started

## Alaska Native Claims Settlement Act (ANCSA) - 1971

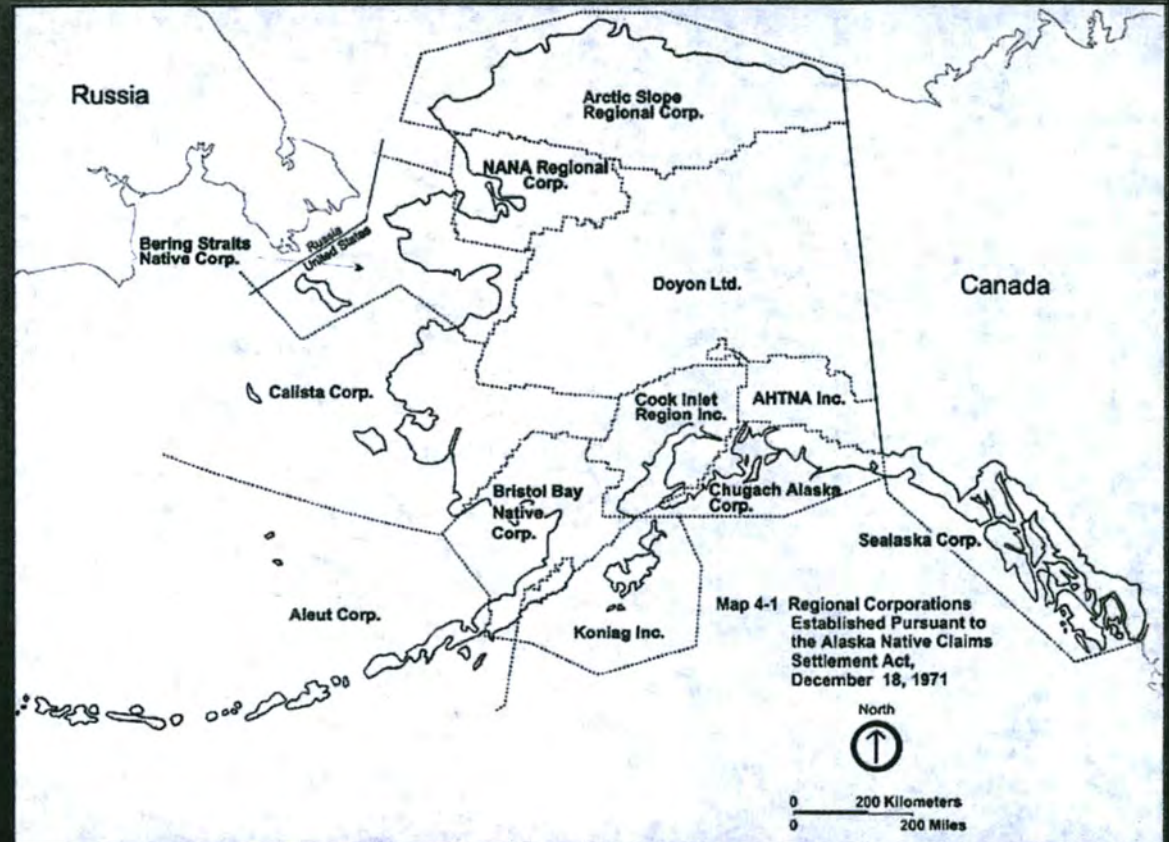
Received 46 million acres

224 Village Corporations received surface estate

12 Regional Corporations received subsurface under village lands

Some Village and Regional corporations received surface and subsurface

Village corporation selection rights generally supersede state selection rights



## ANCSA Section 17(d)(1)

- Secretary of Interior to withdraw land from public land laws to enable ANCSA selections and for further “study and classification”
- Most of these withdrawals are still in place
- Congress in 2004 directed Secretary to identify (d)(1) lands to open, 2006 report back says do it through BLM land plans
- Four adopted BLM plans recommend most (d)(1) withdrawals be revoked
- Secretary has not followed through on BLM recommendations

## ANCSA 17(d)(2)

- ANCSA Section 17(d)(2) – Secretary of Interior to withdraw from state selection lands for study as future National Interest Lands (parks, refuges, etc.).
- Public debate raged over proposals for federal parks, refuges, etc.
- “(d)(2)” led to ANILCA

## 1976 – Federal Land Policy Management Act (FLPMA)

- Comprehensive federal law for managing Bureau of Land Management (BLM) lands
- Established land management requirements and process for BLM lands
- Repealed RS 2477 (although 1969 withdrawal essentially closed Alaska lands to new RS 2477s) – subject to any valid, existing RS 2477 claims

## 1980 – Alaska National Interest Conservation Act (ANILCA)

- Created or expanded National Parks, Wildlife Refuges, National Forests, National Monuments or other protected federal lands.
- New Conservation System Units (CSU' s) areas totaled about 104 million acres
- Protected federal lands now total 137 million acres (37% of the state)
- ANILCA established new wilderness areas
- Established new procedures for public access across federal CSU' s

# ANILCA and state lands

## Title 9 – Amendments to Statehood Act and ANCSA

- Sec. 906 deals with state land selections
- identifies state selections to be approved or rejected
- confirms that Tentatively Approved (TA'd) selections are state owned, lands not yet surveyed
- established right to "topfile" land selections on administratively withdrawn lands
- extended land selection deadline by 10 years (to 1994)
- gave state right to over-select by 25%
- requires BLM to follow state priority list for conveyances
- requires (allows for) state concurrence for actions on state selected land

## State Land History ...contd.

### 1990's

- 1990 Tongass Timber Reform Act repealed ANILCAs 4,500 MMBF/10 year supply requirement and added protected areas to Tongass National Forest
- 1993 Alaska completed land selections to fulfill its entitlement before 1994 selection deadline
- Native and State selections overlap in many areas
- BLM must adjudicate and survey these conflict areas
- Goal was to complete land transfer by 2009, final resolution could take decades

# BLM – Land Transfers

- Alaska Land Transfer Acceleration Act of 2004
- Goal – 95% of land transfers by 2009
- Increased federal funding - especially for survey
- Recent Federal budgets propose significant reduction in funding

# 2013 - Outstanding Federal Land Obligations

- 5 million acres still to be transferred to State of Alaska
- About 21 million acres of state selections and topfilings
- Many selections conflict with ANCSA lands and Native Allotments
- 42 million acres to survey/patent to state
- 2 million acres still to transfer under ANCSA
- 13 million acres to survey/patent under ANCSA
- About 370 Native Allotment parcels to transfer

# State Land – “the Owner State”

- Alaskans own 28% of our state
- Includes land for conservation – such as state parks, state refuges
- Includes land for settlement – community expansion, new communities
- Development – Prudhoe Bay, Usibelli Coal Mine, Pebble Mine ??
- Has funded state budget since 1980 – NO STATEWIDE TAXES
- Created the \$ 46.2 billion Permanent Fund

# Three Laws to Remember

- Alaska Statehood Act – established what the state owns (1958)
- Alaska Native Claims Settlement Act – resolved Aboriginal land claims (1971)
- Alaska National Interest Lands Conservation Act (ANILCA) – determined what lands the federal government would keep (1980)

# For Consideration

- Advocate for continued funding for land surveys and patents – State and ANCSA conveyances largely completed except fine tuning, but not all surveyed
- Request Secretary of Interior to implement BLM's plans by revoking outdated and obsolete (d)(1) withdrawals
- Educate state and federal agencies about promises of statehood, ANCSA and ANILCA, especially the latter (Institute of the North – Dept. of Interior training)

# Federal Lands

National Parks – 54 million acres

National Wildlife Refuges – 77 million acres

National Forests – 22 million acres

BLM – National Petroleum Reserve – 23 million acres

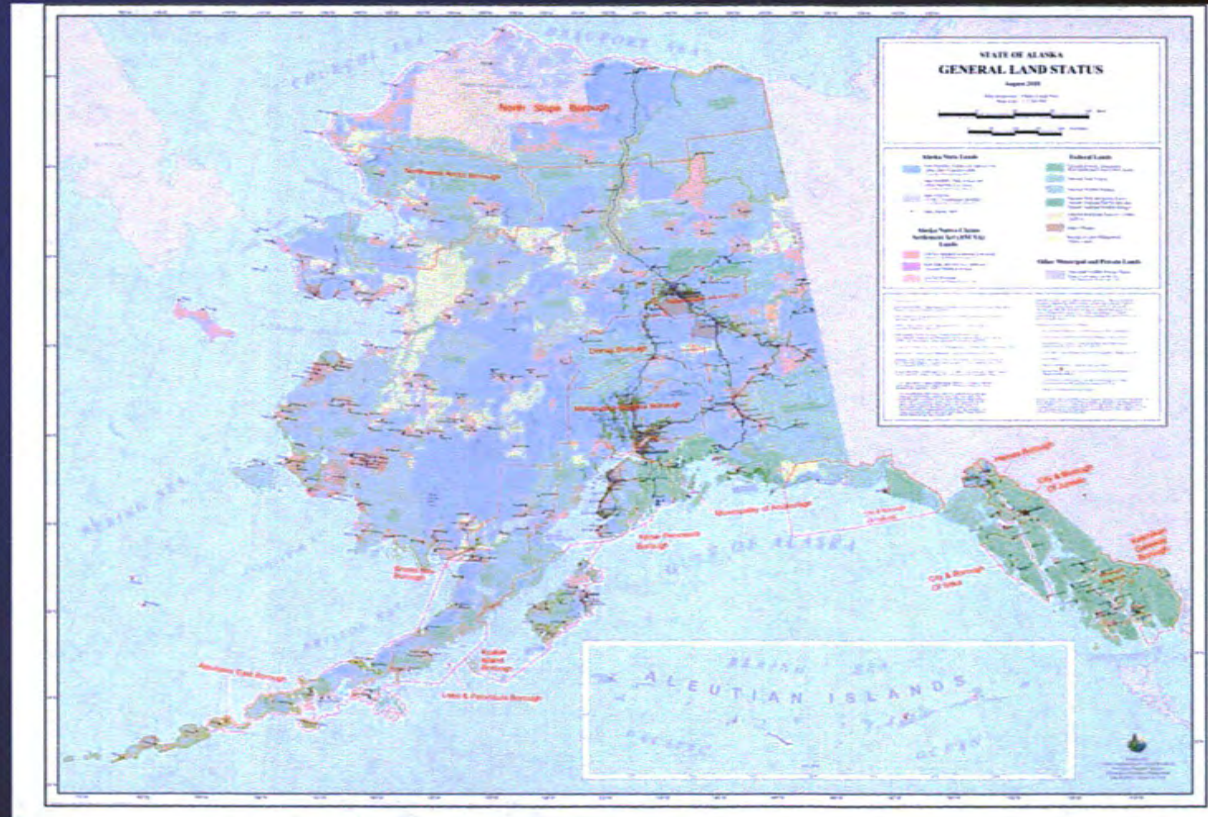
BLM other – 51 million acres

Military – 2 million acres

TOTAL FEDERAL LANDS -

242 million acres

60% of Alaska



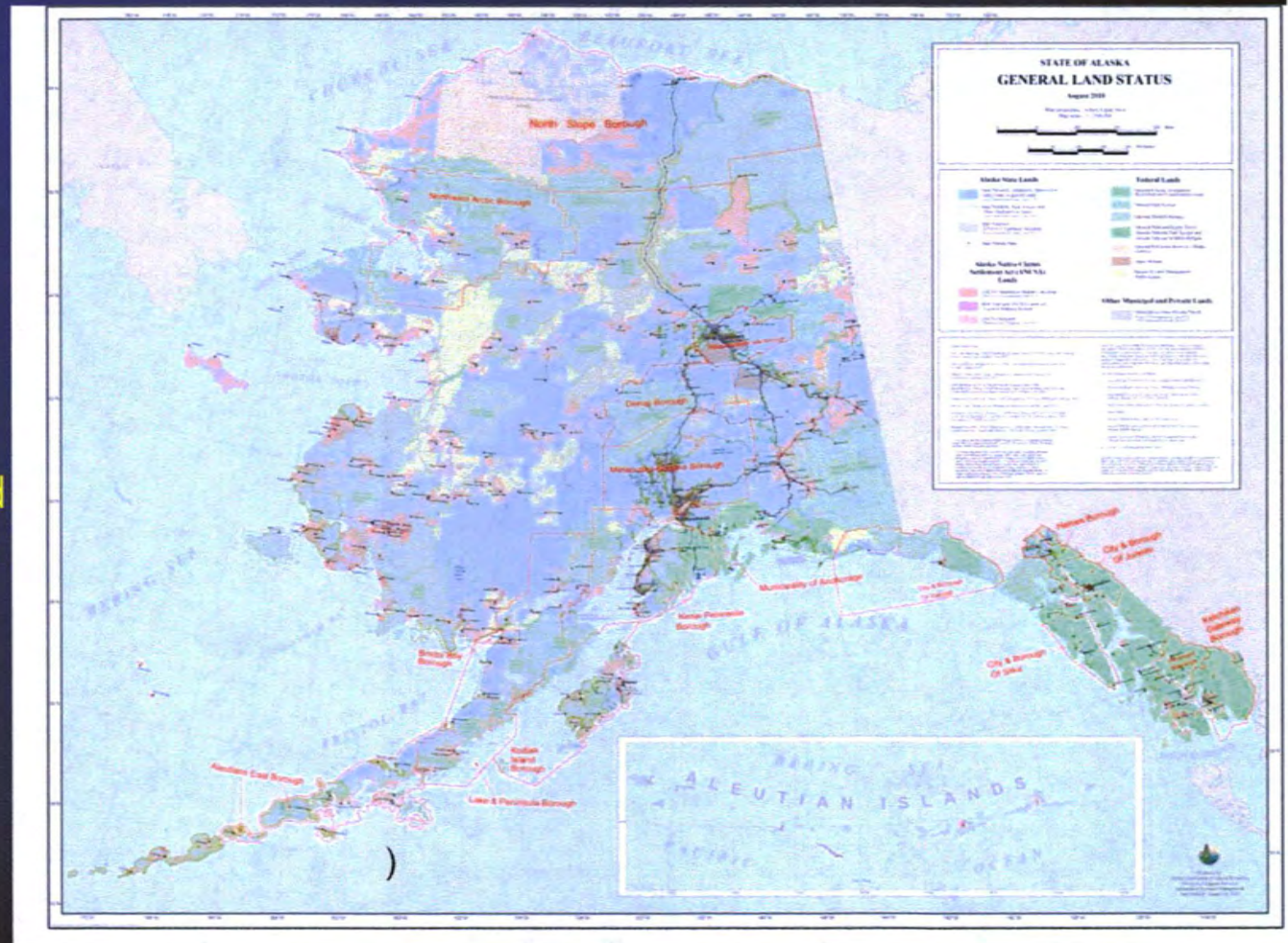
Federal protected areas shown in green on map  
Other Federal lands shown in tan (NPRA), light yellow (other BLM lands) or gray (military lands)

# State, Municipal, ANCSA, private lands

State Land – (blue)  
105 million acres  
(28% of Alaska)

Native Corporation Land – (pink)  
46 million acres  
(11% of Alaska)

Private or municipal land – (grey)  
5 million acres  
(1% of Alaska)



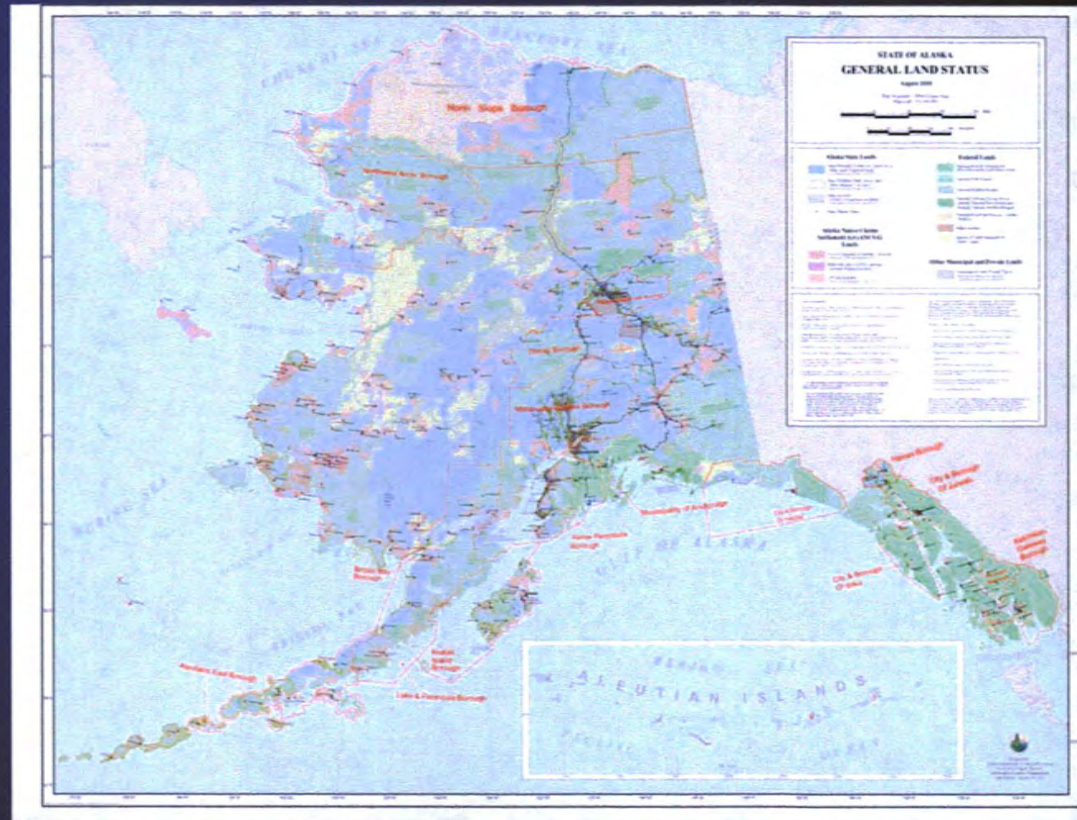
# State, Municipal, ANCSA, private lands - example

State Land – Chugach  
State Park, Mount  
Alyeska, Prudhoe Bay

Native Corporation Land  
– Eklutna Village, Cook  
Inlet Region

Municipal – school sites,  
Kincaid Park

Private – homes and  
businesses



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## A HOUSE RESOLUTION

TO EXPRESS SUPPORT TO THE WESTERN STATES OF THE UNITED STATES OF AMERICA AND THE FEDERAL TRANSFER OF PUBLIC LANDS TO THE WESTERN STATES, AND TO URGE THE UNITED STATES CONGRESS TO ENGAGE IN GOOD FAITH COMMUNICATION AND COOPERATION TO COORDINATE THE TRANSFER OF TITLE TO THE WESTERN STATES.

Whereas, under Article IV, Section 3, of the United States Constitution, "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; and

Whereas, the Constitutional Convention intended this provision of the Constitution to maintain the status quo that had been established to transfer federal territorial lands only to create new states with the same rights of sovereignty, freedom, and independence as the original states; and

Whereas, under these express terms of trust, over time the states claiming federal territorial land ceded their western land to the confederated Union to allow the confederated government to dispose of the lands only to create new states and apply the net proceeds of any sales of the lands only to pay down the public debt; and

Whereas, the United States Constitution contains no expression of intent to authorize the federal government to indefinitely exercise control over western public lands beyond the duty to manage the lands pending the disposal of the lands to create new states, and therefore the lands should be returned to the western states; and

1 Whereas, in order to promote legitimate federal interests the western  
2 states should upon transfer of the public lands directly to the state  
3 where the public land is located agree to affirmatively cede lands  
4 for the national park system, the national wilderness preservation  
5 system, and lands reserved for federal military use, military parks,  
6 and military reservations to the federal government under Article I,  
7 Section 8, Clause 17, of the United States Constitution, on condition  
8 that the lands permanently remain national park lands, and that they  
9 not be sold, transferred, left in substantial disrepair, or conveyed to  
10 any party other than to the state where the land is located; and

11  
12 Whereas, limiting the ability of western states to access and utilize  
13 the public lands' natural resources within their borders is having a  
14 negative impact upon the economy of the western states and  
15 therefore the economy of the entire United States; and

16  
17 Whereas, in order to provide a fair, just, and equitable remedy for  
18 the federal government's past and continuing breaches of its solemn  
19 promises to the western states, the South Carolina House of  
20 Representatives:

21 (1) calls on the federal government to transfer title to all federal  
22 public lands within the western states to the state where the land is  
23 located;

24 (2) urges the United States Congress to engage in good faith  
25 communication, cooperation, and consultation with the western  
26 states to coordinate the transfer of the public lands, and supports the  
27 western states in these efforts;

28 (3) calls upon the western states to agree, upon transfer of the  
29 public lands, to affirmatively cede to the federal government all  
30 lands currently designated as part of the National Park System under  
31 16 U.S.C. Section 1a-1, the National Wilderness Preservation  
32 System under 16 U.S.C. Section 1131, or for military use, military  
33 parks, or military reservations;

34 (4) urges that if any public land in the western states be sold to  
35 private owners, the net proceeds be paid to the Bureau of the Public  
36 Debt to pay down the federal debt; and

37 (5) calls on all other states of the United States to pass a similar  
38 resolution in support of the transfer of the federal public lands to the  
39 western states. Now, therefore,

40  
41 Be it resolved by the House of Representatives:

42

1 That the members of the House of Representatives of the State of  
2 South Carolina, by this resolution, express support to the western  
3 states of the United States of America and the federal transfer of  
4 public lands to the western states, and urges the United States  
5 Congress to engage in good faith communication and cooperation  
6 to coordinate the transfer of title to the western states.

7  
8 Be it further resolved that upon its adoption copies of this resolution  
9 be forwarded to the United States Department of the Interior, the  
10 Majority Leader of the United States Senate, the Speaker of the  
11 United States House of Representatives, the members of the South  
12 Carolina Congressional Delegation, and the Governors, Senate  
13 Presidents, and Speakers of the House of Representatives of the 49  
14 other states.

15 -----XX-----  
16

TRANSFER OF PUBLIC LANDS ACT AND RELATED  
STUDY

2012 GENERAL SESSION  
STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: Wayne L. Niederhauser

Cosponsors:

Francis D. Gibson

Curtis Oda

Johnny Anderson

Richard A. Greenwood

Patrick Painter

Stewart Barlow

Keith Grover

Lee B. Perry

Roger E. Barrus

Stephen G. Handy

Jeremy A. Peterson

Jim Bird

Wayne A. Harper

Val L. Peterson

Derek E. Brown

Neal B. Hendrickson

Dixon M. Pitcher

Melvin R. Brown

Christopher N. Herrod

Kraig Powell

David G. Butterfield

Gregory H. Hughes

Paul Ray

LaVar Christensen

Eric K. Hutchings

Douglas Sagers

Bradley M. Daw

Don L. Ipson

Stephen E. Sandstrom

Brad L. Dee

Todd E. Kiser

Dean Sanpei

John Dougall

Bradley G. Last

V. Lowry Snow

Jack R. Draxler

Rebecca D. Lockhart

Kenneth W. Sumsion

Susan Duckworth

John G. Mathis

Evan J. Vickers

James A. Dunnigan

Daniel McCay

Christine F. Watkins

Rebecca P. Edwards

Ronda Rudd Menlove

R. Curt Webb

Steve Eliason

Michael T. Morley

Ryan D. Wilcox

Craig A. Frank

Merlynn T. Newbold

Brad R. Wilson

Gage Froerer

Jim Nielson

Bill Wright

Brad J. Galvez

Michael E. Noel

29 **General Description:**

30 This bill addresses issues related to public lands, including the transfer of title to public  
31 lands to the state and requiring the Constitutional Defense Council to study or draft  
32 proposed legislation on certain issues related to public lands.

33 **Highlighted Provisions:**

34 This bill:

- 35 ▶ enacts the Transfer of Public Lands Act;
- 36 ▶ defines terms;
- 37 ▶ requires the United States to extinguish title to public lands and transfer title to  
38 those public lands to the state on or before December 31, 2014;
- 39 ▶ provides that if the state transfers title to public lands with respect to which the state  
40 receives title to the public lands under the Transfer of Public Lands Act, the state  
41 shall retain 5% of the net proceeds the state receives, and pay 95% of the net  
42 proceeds the state receives to the United States;
- 43 ▶ provides that the 5% of the net proceeds of those sales of public lands shall be  
44 deposited into the permanent State School Fund;
- 45 ▶ provides a severability clause;
- 46 ▶ requires the Constitutional Defense Council to study or draft legislation on certain  
47 issues related to the transfer, management, and taxation of public lands, including:
  - 48 • drafting proposed legislation creating a public lands commission; and
  - 49 • establishing actions that shall be taken to secure, preserve, and protect the state's  
50 rights and benefits related to the United States' duty to have extinguished title to  
51 public lands and transferred title to those public lands to the state; and
- 52 ▶ makes technical and conforming changes.

53 **Money Appropriated in this Bill:**

54 None

55 **Other Special Clauses:**

56 This bill provides an immediate effective date.

57 **Utah Code Sections Affected:**

58 ENACTS:

59 **63L-6-101**, Utah Code Annotated 1953

60 **63L-6-102**, Utah Code Annotated 1953

61 **63L-6-103**, Utah Code Annotated 1953

62 **63L-6-104**, Utah Code Annotated 1953

63 **Uncodified Material Affected:**

64 ENACTS UNCODIFIED MATERIAL



66 *Be it enacted by the Legislature of the state of Utah:*

67 Section 1. Section **63L-6-101** is enacted to read:

68 **CHAPTER 6. TRANSFER OF PUBLIC LANDS ACT**

69 **63L-6-101. Title.**

70 This chapter is known as the "Transfer of Public Lands Act."

71 Section 2. Section **63L-6-102** is enacted to read:

72 **63L-6-102. Definitions.**

73 As used in this chapter:

74 (1) "Governmental entity" is as defined in Section 59-2-511.

75 (2) "Net proceeds" means the proceeds from the sale of public lands, after subtracting  
76 expenses incident to the sale of the public lands.

77 (3) "Public lands" means lands within the exterior boundaries of this state except:

78 (a) lands to which title is held by a person who is not a governmental entity;

79 (b) lands owned or held in trust by this state, a political subdivision of this state, or an  
80 independent entity;

81 (c) lands reserved for use by the state system of public education as described in Utah  
82 Constitution Article X, Section 2, or a state institution of higher education listed in Section

83 53B-1-102;

84 (d) school and institutional trust lands as defined in Section 53C-1-103;

85 (e) lands within the exterior boundaries as of January 1, 2012, of the following that are  
86 designated as national parks:

87 (i) Arches National Park;

88 (ii) Bryce Canyon National Park;

89 (iii) Canyonlands National Park;

90 (iv) Capitol Reef National Park; and

91 (v) Zion National Park;

92 (f) lands within the exterior boundaries as of January 1, 2012, of the following national  
93 monuments managed by the National Park Service as of January 1, 2012:

94 (i) Cedar Breaks National Monument;

95 (ii) Dinosaur National Monument;

96 (iii) Hovenweep National Monument;

97 (iv) Natural Bridges National Monument;

98 (v) Rainbow Bridge National Monument; and

99 (vi) Timpanogos Cave National Monument;

100 (g) lands within the exterior boundaries as of January 1, 2012, of the Golden Spike  
101 National Historic Site;

102 (h) lands within the exterior boundaries as of January 1, 2012, of the following  
103 wilderness areas located in the state that, as of January 1, 2012, are designated as part of the  
104 National Wilderness Preservation System under the Wilderness Act of 1964, 16 U.S.C. 1131  
105 et seq.:

106 (i) Ashdown Gorge Wilderness;

107 (ii) Beartrap Canyon Wilderness;

108 (iii) Beaver Dam Mountains Wilderness;

109 (iv) Black Ridge Canyons Wilderness;

110 (v) Blackridge Wilderness;

111 (vi) Box-Death Hollow Wilderness;

112 (vii) Canaan Mountain Wilderness;

- 113           (viii) Cedar Mountain Wilderness;
- 114           (ix) Cottonwood Canyon Wilderness;
- 115           (x) Cottonwood Forest Wilderness;
- 116           (xi) Cougar Canyon Wilderness;
- 117           (xii) Dark Canyon Wilderness;
- 118           (xiii) Deep Creek Wilderness;
- 119           (xiv) Deep Creek North Wilderness;
- 120           (xv) Deseret Peak Wilderness;
- 121           (xvi) Doc's Pass Wilderness;
- 122           (xvii) Goose Creek Wilderness;
- 123           (xviii) High Uintas Wilderness;
- 124           (xix) LaVerkin Creek Wilderness;
- 125           (xx) Lone Peak Wilderness;
- 126           (xxi) Mount Naomi Wilderness;
- 127           (xxii) Mount Nebo Wilderness;
- 128           (xxiii) Mount Olympus Wilderness;
- 129           (xxiv) Mount Timpanogos Wilderness;
- 130           (xxv) Paria Canyon-Vermilion Cliffs Wilderness;
- 131           (xxvi) Pine Valley Mountain Wilderness;
- 132           (xxvii) Red Butte Wilderness;
- 133           (xxviii) Red Mountain Wilderness;
- 134           (xxix) Slaughter Creek Wilderness;
- 135           (xxx) Taylor Creek Wilderness;
- 136           (xxxi) Twin Peaks Wilderness;
- 137           (xxxii) Wellsville Mountain Wilderness; and
- 138           (xxxiii) Zion Wilderness;
- 139           (i) lands with respect to which the jurisdiction is ceded to the United States as provided
- 140           in Section 63L-1-201 or 63L-1-203;

141 (j) real property or tangible personal property owned by the United States if the  
142 property is within the boundaries of a municipality; or

143 (k) lands, including water rights, belonging to an Indian or Indian tribe, band, or  
144 community that is held in trust by the United States or is subject to a restriction against  
145 alienation imposed by the United States.

146 Section 3. Section **63L-6-103** is enacted to read:

147 **63L-6-103. Transfer of public lands.**

148 (1) On or before December 31, 2014, the United States shall:

149 (a) extinguish title to public lands; and

150 (b) transfer title to public lands to the state.

151 (2) If the state transfers title to any public lands with respect to which the state receives  
152 title under Subsection (1)(b), the state shall:

153 (a) retain 5% of the net proceeds the state receives from the transfer of title; and

154 (b) pay 95% of the net proceeds the state receives from the transfer of title to the  
155 United States.

156 (3) In accordance with Utah Constitution Article X, Section 5, the amounts the state  
157 retains in accordance with Subsection (2)(a) shall be deposited into the permanent State School  
158 Fund.

159 Section 4. Section **63L-6-104** is enacted to read:

160 **63L-6-104. Severability clause.**

161 If any provision of this chapter or the application of any provision to any person or  
162 circumstance is held invalid by a final decision of a court of competent jurisdiction, the  
163 remainder of this chapter shall be given effect without the invalid provision or application. The  
164 provisions of this chapter are severable.

165 Section 5. **Constitutional Defense Council study.**

166 (1) During the 2012 interim, the Constitutional Defense Council created in Section  
167 63C-4-101 shall prepare proposed legislation:

168 (a) creating a public lands commission to:

169 (i) administer the transfer of title of public lands to the state; and  
170 (ii) address the management of public lands and the management of multiple uses of  
171 public lands, including addressing managing open space, access to public lands, local planning,  
172 and the sustainable yield of natural resources on public lands;

173 (b) to establish actions that shall be taken to secure, preserve, and protect the state's  
174 rights and benefits related to the United States' duty to have extinguished title to public lands,  
175 in the event that the United States does not meet the requirements of Title 63L, Chapter 6,  
176 Transfer of Public Lands Act;

177 (c) making any necessary modifications to the definition of "public lands" in Section  
178 63L-6-102, including any necessary modifications to a list provided in Subsections  
179 63L-6-102(3)(e) through (h);

180 (d) making a determination of or a process for determining interests, rights, or uses  
181 related to:

- 182 (i) easements;
- 183 (ii) geothermal resources;
- 184 (iii) grazing;
- 185 (iv) mining;
- 186 (v) natural gas;
- 187 (vi) oil;
- 188 (vii) recreation;
- 189 (viii) rights of entry;
- 190 (ix) special uses;
- 191 (x) timber;
- 192 (xi) water; or
- 193 (xii) other natural resources or other resources; and

194 (e) determining what constitutes "expenses incident to the sale of public lands"  
195 described in Subsection 63L-6-102(2).

196 (2) During the 2012 interim, the Constitutional Defense Council created in Section

197 63C-4-101 shall study and determine whether to prepare proposed legislation:  
198 (a) to administer the process for:  
199 (i) the United States to extinguish title to public lands;  
200 (ii) the state to receive title to public lands from the United States; or  
201 (iii) the state to transfer title to any public lands the state receives in accordance with  
202 Title 63L, Chapter 6, Transfer of Public Lands Act;  
203 (b) establishing a prioritized list of management actions for the state and the political  
204 subdivisions of the state to perform on public lands:  
205 (i) before and after the United States extinguishes title to public lands; and  
206 (ii) to preserve and promote the state's interest in:  
207 (A) protecting public health and safety;  
208 (B) preventing catastrophic wild fire and forest insect infestation;  
209 (C) preserving watersheds;  
210 (D) preserving and enhancing energy and the production of minerals;  
211 (E) preserving and improving range conditions; and  
212 (F) increasing plant diversity and reducing invasive weeds on range and woodland  
213 portions of the public lands;  
214 (c) establishing procedures and requirements for subjecting public lands to property  
215 taxation;  
216 (d) establishing other requirements related to national forests, national recreation areas,  
217 or other public lands administered by the United States; and  
218 (e) addressing the indemnification of a political subdivision of the state for actions  
219 taken in furtherance of Title 63L, Chapter 6, Transfer of Public Lands Act.  
220 (3) The Constitutional Defense Council may study any other issue related to public  
221 lands as determined by the Constitutional Defense Council.  
222 (4) The Constitutional Defense Council shall:  
223 (a) make a preliminary report on its study and preparation of proposed legislation to the  
224 Natural Resources, Agriculture, and Environment Interim Committee and the Education

225 Interim Committee:

226 (i) on or before the June 2012 interim meeting; and

227 (ii) on or before the September 2012 interim meeting; and

228 (b) report on its findings, recommendations, and proposed legislation to the Natural

229 Resources, Agriculture, and Environment Interim Committee and the Education Interim

230 Committee on or before the November 2012 interim meeting.

231 **Section 6. Effective date.**

232 If approved by two-thirds of all the members elected to each house, this bill takes effect

233 upon approval by the governor, or the day following the constitutional time limit of Utah

234 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,

235 the date of veto override.

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# BLM-Alaska Conveys 729,000 Acres to State of Alaska



MAP: BLM-ALASKA

ANCHORAGE, AK—The Bureau of Land Management held a signing ceremony patenting a large block of land near Sleetmute to the State of Alaska. BLM-Alaska State Director Bud Cribley signed the patent and presented the final documents to Alaska Department of Natural Resources Deputy Commissioner Ed Fogels.

“Getting to today’s signing ceremony is the result of a lot of cooperation and collaboration with the State of Alaska,” Cribley said.



PHOTO COURTESY OF BLM-ALASKA

**BLM-Alaska State Director Bud Cribley (right) signing the patent as Alaska Department of Natural Resources Deputy Commissioner Ed Fogels looks on.**

The 729,000 acres patented today were previously conveyed to the State in Tentative Approval (TA) status, subject to survey. The BLM completed survey in 2011, leading to final patent. The lands are located along the Kuskokwim River about 100 miles downriver from McGrath. About 5 million acres of the State's 105-million-acre total allotment remain to be conveyed under the Statehood Act. About 37 million of that 105 million acres have been conveyed with Tentative Approval and are just awaiting survey for final patent.



PHOTO COURTESY OF BLM-ALASKA

**Cribley filling in blocks of land patented to the State of Alaska.**

For more than 30 years, the BLM has been involved with the survey and conveyance of lands in Alaska under three statutes: the Native Allotment Act of 1906; the Alaska Statehood Act, and the Alaska Native Claims Settlement Act (ANCSA). The work being done to implement these laws is collectively called the Alaska Land Transfer Program. When completed, over 150 million acres, approximately 42% of the land area in Alaska, will have been transferred from federal to state and private ownership.

Cribley said that today's signing comes at a pivotal time in the BLM's Land Transfer Program.

"We just completed a comprehensive inventory and analysis of our Land Transfer Program and can now clearly see what is left to

accomplish," he said. "We are laying out a plan to finish the job, and taking action on all fronts, maximizing the resources we're given to expedite actions and get to completion."



PHOTO COURTESY OF BLM ALASKA

From left, State of Alaska Director of Mining, Land and Water Brent Goodrum; Ron Dunton, BLM Deputy State Director; Fogels, Cribley stand in front of the BLM's Land Transfer Program map.

SOURCE: BLM-Alaska

# Alaska Dispatch News

Published on *Alaska Dispatch News* (<http://www.adn.com>)

[Home](#) > State asks feds for transfer of 19,322 disputed acres on North Slope

[Dermot Cole](#) <sup>[1]</sup>

October 20, 2014

**Main Image:**

[Property dispute](#) <sup>[2]</sup>

When President Dwight D. Eisenhower inked the declaration under which the 49th state joined the union, no one thought that 55 years later, the state and federal governments would still be arguing about the map of Alaska.

A key part of the Alaska Statehood Act allowed the new state to select a land entitlement of about 104 million acres, with a goal of using that land as the basis for its future economy.

One of the earliest statehood selections for land on the North Slope later turned out to contain the largest oil field ever found in North America, a bonanza that has fueled the economy for nearly 40 years.

But completing the land selections, a real estate transaction that exceeds the size of California, has proven to be more difficult than anyone predicted.

Decades of delay followed because Congress didn't settle Native land rights until 1971, and a growing national environmental movement led to a [landmark 1980 law](#) <sup>[3]</sup> putting 100 million acres of Alaska into parks and other conservation units.

To date, the federal government has transferred almost 100 million acres, with 5 million acres yet to be settled upon.

But disputes continue over tracts of land that either are or are not eligible for state land selection.

On Friday, the [state sent a letter](#) <sup>[4]</sup> to the Bureau of Land Management asking for a "priority conveyance" of 19,322 acres that the state contends are west of the Arctic National Wildlife Refuge rather than in the refuge. The property is not far from the Point Thomson oil field and the state wants to offer it for oil and gas leasing.

For nearly a half-century, the state has periodically made claims to the property, while the federal government has argued that it rightly remains in federal hands.

The Parnell administration contends that the U.S. Fish & Wildlife Service has erroneous maps and doesn't know where its property ends. The state argues that land between the Canning River and the Staines River is not part of the refuge. It cites a proposed map published in 1957 that showed the western boundary at the Canning River.

But the status of the land is not that clear-cut.

For instance, the ANWR map on the state website [5] shows the Staines River as the boundary.

"The maps show the boundaries [6] of the conservation system units created or expanded by ANILCA, as of December 2, 1980," the state says. "The photographs of the maps were taken by state personnel within several days of the December 2, 1980 passage of ANILCA."

As part of the 1980 Alaska National Interest Lands Conservation Act, the Fish and Wildlife Service published a map showing the western boundary of the refuge extending past the Canning River to the Staines River.

Both river names originated with Sir John Franklin in 1828, one named for British Foreign Minister George Canning and the other for Sir Thomas Staines, a Royal Navy officer.

The federal government has long maintained that there is nothing wrong with its maps and that the land is part of the refuge. The Staines River is a distributary of the Canning River, which is the opposite of a tributary.

The Staines and Canning rivers flow from the same source and divide into two streams on the Arctic coastal plain, which is one reason why the Alaska Department of Fish and Game has long referred to the Staines as the "Staines River Branch of the Canning River."

But the state says its investigation shows that the Staines is "neither the west bank of the Canning, nor the extreme west bank of the Canning."

Natural Resources Commissioner Joe Balash said that a 1983 legal description by the Fish & Wildlife Service helps bolster its argument. The legal description uses the name Canning River, but the coordinates shown are for a spot several miles to the west on the Staines River.

This means that the legal description is either a "geographic impossibility," as the state says, or it is a possibility, based on the belief that the Staines is the west bank of the Canning.

The west bank property dispute is under review by the BLM land transfer office.

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